UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

John Demjanjuk,

Petitioner,

v.

Eric H. Holder, Attorney General of the United States,

Respondent.

No. 09-3469

PETITIONER'S MOTION FOR STAY PENDING REVIEW

Petitioner, John Demjanjuk, by his undersigned attorneys, hereby moves for the entry of an order staying his removal from the United States pending this Court's review of the April 15, 2009 decision of the Board of Immigration Appeals ("BIA") denying Mr. Demjanjuk's Motion to Reopen. A petition for review was filed at the same time as this motion.

BACKGROUND[1]

1. Preliminary Statement

Twenty-four years ago this Court permitted the extradition of John Demjanjuk to Israel to face charges of murder which carried a death sentence.

[1] Much of the Background is a recitation of the Background contained in the Motion for Stay Pending Review filed April 14, 2009 in No. 09-3416.

Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985). In Israel he was convicted, sentenced to death, and finally released after spending seven years in solitary confinement and five years under sentence of death. Sixteen years ago this Court vacated its 1985 order and permitted John Demjanjuk to return to the United States having found that the Office of Special Investigations of the Department of Justice ("OSI") had committed a fraud on the court by withholding exculpatory evidence from Mr. Demjanjuk's defense attorneys in the United States. *Demjanjuk v. Petrovsky,* 10 F.3d 338 (6th Cir. 1993).[2]

Once again, more than twenty years later, the OSI is preparing to send John Demjanjuk to a foreign country. Again, he will stand trial for his life -- not this time by hanging but by the cruel and inhumane condition of transport and the stress of arrest, confinement and trial of this now 89 year old man who is in poor health. Once again, the OSI says that there is reliable evidence that he is a murderer. Once again, that evidence is of one or more elderly witnesses. Once, again, they say that the courts have no business interfering. In a new wrinkle, the OSI this time invokes an utterly mistaken view of foreign law -- this time of German law -- seeking to say that involuntary service as a camp guard makes one

[2] In its 1993 decision, this Court did not comment on the fact that the same exculpatory materials OSI withheld from Mr. Demjanjuk's defense in the United States were also withheld from the Israeli *prosecution* which proceeded to indict him, try him and convict him of multiple murders while exculpatory evidence rested in the files of OSI.

liable for murder under German law. And this time they are willing to accept a false portrayal of John Demjanjuk as a "resident" of Munich.

We seek a stay because this time, perhaps, judicial inquiry before the deed is done can prevent an injustice.

2. Proceedings to Date

On May 19, 2008 the Supreme Court denied certiorari to Mr. Demjanjuk's petition for review of this Court's affirmance of a BIA decision ordering Mr. Demjanjuk removed to Ukraine, Poland or Germany. *See Demjanjuk v. Mukasey*, 514 F.3d 616 (6th Cir.), *cert. denied, Demjanjuk v. Mukasey,* ___U.S.___, 128 S. Ct. 2491 (2008). The BIA, *inter alia*, had denied Mr. Demjanjuk's request for deferral of removal to Ukraine under the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention"). None of the countries to which Mr. Demjanjuk was ordered removed agreed to accept him.

On March 10, 2009 a court in Munich Germany issued an arrest order ("Haftbefehl") for the arrest of Mr. Demjanjuk. No steps were taken by the German authorities to seek Mr. Demjanjuk's extradition pursuant to the extradition treaty between the United States and Germany. Toward the end of March reports began appearing in the press that Mr. Demjanjuk would shortly be transported to Germany, though to Mr. Demjanjuk's knowledge no extradition proceedings had

been commenced in either Germany or the United States. At the end of March it became apparent that the German authorities were considering consenting to Mr. Demjanjuk's deportation to Germany whereupon they would arrest him on arrival. This approach was more or less confirmed by a press report of an April 2 statement by a spokesman of the German Ministry of Justice in Berlin.

The decision of the Germany Ministry of Justice to seek to prosecute Mr. Demjanjuk, notwithstanding the absence of any evidence that he had been complicit in any specific acts at Sobibor or any other camp in occupied Europe, represented a change in circumstances. This change in circumstances in Germany was amplified by Mr. Demjanjuk's advancing age and deteriorating health condition. Accordingly, Mr. Demjanjuk moved to reopen the removal order and seek deferral of removal to Germany under the Convention.[3]

On April 7, 2009 Mr. Demjanjuk filed with the BIA a Motion to Reopen the order of removal first entered against him in 2005 by the Immigration Court and affirmed by the BIA in 2006. At the same time, Mr. Demjanjuk filed with the BIA a Motion for an Emergency Stay asserting that the Immigration and Customs Enforcement Division of the Department of Homeland Security ("ICE") was

[3] Counsel mistakenly filed the Motion to Reopen and a Motion for Stay with the Immigration Court on April 2, 2009. The Immigration Court entered a stay on April 3 but on April 6 returned the filing and provided for the stay to dissolve on April 8.

prepared to execute the outstanding removal order. On April 10, 2009 the BIA denied Mr. Demjanjuk's Motion for an Emergency Stay.

Mr. Demjanjuk filed a Petition for Review and a Motion for Stay Pending Review with this Court on April 14, 2009. The Court granted the stay but ordered counsel for the parties to file briefs on jurisdictional and substantive issues by April 23, 2009.[4]

On April 15, 2009 the BIA issued an order denying Mr. Demjanjuk's Motion to Reopen. On April 23, 2009 Mr. Demjanjuk filed a Petition for Review of the April 15 BIA order, a Motion for Leave to File in Forma Pauperis, and this Motion for Stay Pending Review.

STATEMENT OF JURISDICTION

Under 8 USC 1252(a) this Court has jurisdiction to review final orders of removal. The Court's jurisdiction extends to review of an order of the BIA denying a motion to reopen. 8 U.S.C. 1252(a), *Haddad v. Gonzales*, 437 F.3d 515 (6th Cir. 2006).

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[4] Mr. Demjanjuk agrees with the government that in light of the April 15, 2009 decision by the BIA denying his Petition to Reopen, the Petition for Review in No. 09-3416 is now moot. The BIA's denial of Mr. Demjanjuk's Motion to Reopen is clearly a reviewable final order. *Haddad v. Gonzales*, 437 F.3d 515 (6th Cir. 2006). Mr. Demjanjuk will stipulate to the dismissal of the Petition for Review in 09-3416 pursuant to Rule 42(b), or consent to the Court granting the government's April 20, 2009 Motion to Dismiss.

APPLICABLE LAW FOR GRANTING A STAY

A motion for a stay pending review of an order of the BIA is governed in this circuit by the traditional standards applied to stays pending appeal: (i) likelihood of success on the merits, (ii) irreparable harm to the applicant if the stay is not granted, (iii) that the potential harm to the applicant outweighs the harm to the opposing party if a stay is not granted, and (iv) that the granting of the stay would serve the public interest. *Bejjani v. Immigration and Naturalization Service*, 271 F.3d 670 (6th Cir. 2001). *See also Tesfamichael v. Gonzales,* 411 F.3d 169 (5th Cir. 2005); *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005); *Douglas v. Ashcroft*, 374 F.3d 230 (3d Cir. 2004), *but see Teshome-Gebreegziabher v. Mukasey,* 528 F.3d 330 (4th Cir. 2008).

APPLICATION OF LAW TO THE FACTS OF THIS CASE COUNSEL THE GRANTING OF A STAY PENDING REVIEW

1. Irreparable Injury

Failure of this Court to grant a stay pending review to Mr. Demjanjuk would cause him irreparable injury.

A. In the absence of a stay the government will execute the order of removal.

In its Rule 28(j) letter filed on April 17, 2009 in No. 09-3416 the Department of Justice stated that "Respondent agrees that it will not remove

Petitioner for five days following this Court's dismissal order up to and including April 30, 2009, affording Petitioner ample time to appeal the BIA's ruling and litigate a stay motion." The clear implication of that letter is that in the absence of a stay, the government will shortly attempt to remove Mr. Demjanjuk to Germany.

B. Removal of Mr. Demjanjuk to Germany will subject him to severe pain and suffering.

Attached to this Motion are the following documents:

Attachment A: Mr. Demjanjuk's Motion to Reopen filed with the BIA (Contains as an exhibit Video No. 1)[5]

Attachment B: Mr. Demjanjuk's Emergency Motion to Stay Removal filed with the BIA

Attachment C: Mr. Demjanjuk's Reply in support of his Motion to Stay Removal filed with the BIA

Attachment D: Video No. 2 (discussed in detail below.)

(i) Evidence of irreparable injury presented to the BIA

As the Court will see from Motion to Reopen and the supporting exhibits, Mr. Demjanjuk is an 89 year old man who is in poor health. He is suffering from a variety of ailments including:

Myelodysplastic Syndrome (MDS)
Chronic Kidney Disease (CKD Stage 3)

[5] The video clip of the ICE medical examination of Mr. Demjanjuk will be referred to as "Video No. 1." This video was submitted to the BIA in support of the Motion to Reopen and to this Court in support of the Motion for Stay Pending Review in 09-3416. It is also attached to this Motion for Stay Pending Review.

Hyperoxaluria
Kidney Stones
Anemia (secondary to MDS)
Leucopenia (secondary to MDS)
Arthritis
Severe Spinal Stenosis

On April 2, 2009 ICE sent a doctor to examine Mr. Demjanjuk to determine whether he was in a medical condition suitable to endure an airplane flight from Cleveland to Munich, Germany. That medical examination was videotaped by John Demjanjuk, Jr., Mr. Demjanjuk's son. A video clip (11 minutes) made from that tape was submitted to the BIA in support of the Motion to Reopen. The Court need only review that clip to see that Mr. Demjanjuk is a very sick man and completely unable to withstand the rigors of travel to Germany, arrest, incarceration and trial in Germany. Subjecting him to such treatment in his current medical condition would cause him extreme and prolonged pain and suffering.

Even the government, in denying Mr. Demjanjuk's application for an administrative stay of removal under 8 U.S.C. 1231(c)(2)(A), concluded (emphasis added):[6]

> On April 2, 2009, an ICE Division of Immigration Health Services (DIHS) physician conducted a physical examination and concluded that Mr. Demjanjuk is *medically stable* to travel from the United States to the FRG. *A DIHS physician and nurse will be available to*

[6] The ICE decision denying the administrative stay is attached as Attachment No. 2 to the Emergency Motion to Stay Removal filed with the BIA.

> *assist him during the flight. Medical personnel will monitor his medical condition while en route from Cleveland, Ohio, to Munich, FRG.*

Notwithstanding Mr. Demjanjuk put the medical exam in issue before the BIA, ICE did not submit its own doctor's medical report nor has ICE made it available to Mr. Demjanjuk.[7] Mr. Demjanjuk does not understand the meaning of "medically stable" in this context. Some indication that it could apply to a person who is very ill can be drawn from the fact that ICE representatives have told Mr. Demjanjuk's family that ICE plans to transport Mr. Demjanjuk from Cleveland to Munich in a G4 private plane in which he will be accompanied by a physician, a nurse, and a guard.

It is not clear whether Mr. Demjanjuk's severe spinal stenosis, the pain of which is obvious on the video clip, will require that Mr. Demjanjuk be carried on a stretcher on the plane and heavily medicated. The precise meaning of "medically stable" in these circumstances can only be determined by examination of the complete medical report. The Court's review of the video clip, however, will be sufficient to convince it that this is not a deportation but a medical evacuation of an extremely sick man.

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[7] The Court has ordered the government to provide the Court with the medical report that formed the basis for its decision that Mr. Demjanjuk is medically stable enough to travel to Germany. *See* Procedural Order of April 16, 2009 entered in No. 09-3416.

It is clear that ICE intends to use a standard jet to transport Mr. Demjanjuk to Munich, not one equipped with an ICU environment for sustaining the life of a patient whose anemic diseases limit his red and white blood cell counts and thus his body's ability to oxygenate. Further, one need not be a medical specialist to understand a patient can be medically stable in his bedroom and nevertheless in life danger if stressed on an overseas flight to a destination where arrest and incarceration await. Nor is the transportation team demonstrably competent to manage a medical air emergency. We will discuss this issue in greater detail in connection with the discussion of Mr. Demjanjuk's expectations of treatment while under arrest and incarcerated in Germany.

(ii) Evidence of irreparable injury not presented to the BIA

In considering the propriety of a stay pending review, the Court should take note of new evidence that directly supports Mr. Demjanjuk's contention that subjecting him to the rigors of arrest, incarceration and trial in Germany would inflict severe pain and suffering. In the mid-afternoon of April 14, 2009, the day this Court entered its stay in No. 09-3416, ICE agents entered Mr. Demjanjuk's house, arrested him, and moved him to an office in the Federal Building at 1240 East Ninth Street in Cleveland. The action was videotaped by a WKYC television

cameraman who was inside Mr. Demjanjuk's house at the time. Mr. Demjanjuk has obtained a copy of that videotape. It is attached hereto as Attachment D.[8]

The WKYC videotape is shocking and illustrates dramatically the severe pain and suffering caused to Mr. Demjanjuk by his arrest and incarceration by ICE agents. The Court need not rely on speculation as to the effect of arrest and incarceration on Mr. Demjanjuk--it can see it as it *actually took place* only an hour before this Court entered its stay on April 14.

It is obvious that subjecting Mr. Demjanjuk to the pain and suffering of transportation to Germany in his physical condition and to a period of arrest and incarceration and possibly trial in Germany is an injury that cannot be possibly be repaired. If Mr. Demjanjuk ultimately prevails in his Petition for Review, the *interim* pain and suffering he will have undergone cannot be undone or compensated. We now turn to the question of probability of success on the merits.

2. Probability of success on the merits

The BIA took two separate lines of attack in rejecting Mr. Demjanjuk's Motion to Reopen. The first was to hold that the Motion was filed more than 90

[8] Mr. Demjanjuk did not obtain a copy of Video 2 until Monday April 20, 2009. It was thus impossible to submit it to the BIA before the BIA's April 15 decision denying Mr. Demjanjuk's Motion to Reopen. It would have been futile to submit Video 2 after the BIA's April 15, 2009 decision as the BIA held that 8 CFR 1003.2(c)(3)(ii) did not authorize waiving the 90 day limit on Motions to Reopen where the relief sought was a *deferral* of removal rather than asylum or the withholding of removal.

days after the final administrative decision on the removal, and that under 8 CFR 1003.2(c)(3)(ii) the Board had no authority to reopen the case because Mr. Demjanjuk's request was for *deferral* of removal, a form of protection not referenced in the exception to the 90 day rule contained in 8 CFR 1003.2(c)(3)(ii). *See* BIA Decision at 1-2. The BIA's second line of attack was that Mr. Demjanjuk's allegations in his Motion to Reopen did not meet the definition of "torture" contained in the regulations implementing the Convention. *See* BIA Decision at 2, 8 CFR 1208.18.

A. 8 CFR 1003.2 As Interpreted by the BIA Is Inconsistent with Applicable Law.

8 CFR 1003.2(c)(2) provides that motions to reopen must be filed within 90 days of the date of entry of the final administrative decision. Exceptions to this rule are provided in 8 CFR 1003.2(c)(3). In its decision, the Board held that Mr. Demjanjuk "may only seek deferral of removal under the Convention [Against Torture], a form of protection from removal that is not referenced in the 8 CFR 1003.2(c)(3)(ii) exception." Thus, according to the Board, it did not have jurisdiction to grant a motion to reopen seeking *deferral* of removal under the Convention when the motion was filed more than 90 days after the entry of a final administrative decision. The Board predicated its lack of jurisdiction on the fact that a *deferral* of removal (as opposed to a request for asylum or withholding deportation) was not a form of protection referenced in 8 CFR 1003.(c)(3)(ii).

Article 3 of the Convention provides, in part, as follows:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The United States signed the Convention on April 18, 1988 and ratified it on October 21, 1994. Ratification by the Senate was subject to a number of reservations, the only relevant one being that "the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing." *See* 136 Cong. Rec. 36192-36199, United States Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1990).

In Section 2242(b) of the Omnibus Consolidated Appropriations Act of 1998 (P.L. 105-277, 112 Stat. 2681-683), Congress required:

> Not later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment of Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

It is clear that the law required the agencies, including the Department of Justice, to promulgate regulations *to implement the obligations of the United States* under Article 3. One of the obligations of the United States under Article 3 is that

it not expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. As interpreted by the Board, the regulations in 8 CFR 1003.2 are not consistent with that Congressional mandate. If, prior to a person's removal, conditions in the country to which he is to be removed change such that the person would be subject to torture in that country, the interpretation of 8 CFR 1003.2(c)(3)(ii) adopted by the Board would result in his removal to such country notwithstanding it is the obligation of the United States under the Convention not to do so.

A regulation, or an interpretation of a regulation, that purports to limit a motion to reopen to the 90 day period following entry of a final administrative order is not in accordance with applicable law to the extent that it precludes reopening a case to consider changed country conditions in connection where the movant is seeking a deferral of removal under the Convention Against Torture.[9]

B. The Board's conclusion that Mr. Demjanjuk would not be subject to torture in Germany was an abuse of discretion.

The Court's standard of review of a denial of a motion to reopen is one of abuse of discretion. *Allabani v. Gonzales*, 402 F.3d 668, 675 (6th Cir. 2005);

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[9] *Chevron* deference is not appropriate because the interpretation of the regulation adopted by the Board is plainly in conflict with the applicable law enacted by Congress. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Here, "Congress has directly spoken to the precise question" at issue.

Haddad v. Gonzales, 437 F.3d 515 (6th Cir. 2006). The BIA found that (BIA Decision at 2):

> The facts determined in the denaturalization proceedings in the federal courts and established in these administrative removal proceedings by collateral estoppels, do not lend themselves to a conclusion that any pain or suffering the respondent might suffer if he is detained in Germany would be incident to anything other than legitimate law enforcement objectives.

The Board went on to find that Mr. Demjanjuk (BIA Decision at 2-3):

> has not provided any objective evidence establishing that Germany's criminal justice system does not consider a defendant's physical capacity to stand trial,; that he will likely be detained pending trial; or that if he is detained appropriate medical care will not be provided or he will otherwise be subjected to conditions that reach the "extreme form of cruel and inhumane treatment" necessary to constitute torture. 8 CFR 1208.18(a)(2).

Mr. Demjanjuk's argument to the Board was straightforward. Putting a sick 89 year old man through the rigors of arrest, incarceration and trial in Germany would inflict severe pain and suffering on him that rise to the level required by the regulations (8 CFR 1208.18) to constitute torture as the United States has implemented the Convention. Moreover, it is clear that the *purpose and intent* of the German authorities in accepting Mr. Demjanjuk's deportation and then subjecting him to this abusive treatment is to punish him (or, perhaps more accurately, to be seen to be punishing him) for alleged offenses committed during World War II. This meets the standard of "torture" under the Convention as

implemented by the United States, severe physical and mental pain intentionally inflicted on a person by or at the direction of someone acting in an official capacity for the purpose of punishing him for suspected offenses. *See* 8 CFR 1208.18(a).

The BIA ignored evidence that subjecting Mr. Demjanjuk to the rigors of arrest, incarceration and trial would inflict severe pain and suffering, clearly far beyond that normally experienced by someone undergoing ordinary judicial procedures--arrest, trial and imprisonment. The BIA ignored the extensive evidence before it of Mr. Demjanjuk's serious medical condition. Mr. Demjanjuk presented to the BIA not only medical reports that documented his medical condition, he also presented Video No. 1, a video clip of part of a physical examination by the government's doctor which plainly showed Mr. Demjanjuk's frailty and serious physical condition. The BIA's failure to consider the evidence of Mr. Demjanjuk's physical condition before it and the intersection of Mr. Demjanjuk's physical condition with the effects of arrest, incarceration and trial in Germany was an abuse of discretion.

The Board also framed the issue in terms of the "rules" of the criminal justice system in Germany and what evidence Mr. Demjanjuk presented as to those rules. The issue, however, is not what the "rules" are in Germany, but what will *actually happen* to Mr. Demjanjuk if he is removed to Germany. The Board failed to consider what *will happen* to him in Germany in light of what *has actually*

happened to him in the United States. The action of United States immigration enforcement authorities provide evidence of the likely conduct of enforcement authorities in other countries which are not dissimilar to the United States. How did the United States enforcement authorities act? The BIA had evidence before it on this issue that it completely ignored.

Mr. Demjanjuk presented evidence to the BIA that ICE found him "medically stable" to withstand transportation to Germany and concluded (April 3, 2009 Letter of Victor Clausen Denying Request for Administrative Stay of Removal):

> In summary, after reviewing Mr. Demjanjuk's Application and DIHS's assessment of his ability to travel in light of the factor enumerated in 8 CFR 212.5 and INR 241(c)(2)(A), 8 USC 1231(c)(2)(A), I have concluded that your client can safely fly from the United States to the FRG. Accordingly the Application is denied.

The evidence before the BIA of Mr. Demjanjuk's physical condition was clearly inconsistent with ICE's determination, and although Congress has made ICE's determination non-reviewable in either an administrative or a judicial forum (8 U.S.C. 1252(g)), Congress did not preclude either the BIA (or this Court) from taking account of the *fact* of the approach taken by the enforcement agency. The *facts* before the BIA clearly showed that ICE intended to move Mr. Demjanjuk to Germany without any regard to his medical condition or to the pain and suffering

such transportation would cause to on him. In light of Video No. 1 which was before the BIA, no other conclusion is rational. The fact that the United States immigration enforcement authorities were prepared to take actions against Mr. Demjanjuk regardless of the pain and suffering they caused sheds some light on the treatment he could expect in Germany.

Notwithstanding the hard evidence before it that ICE, an agency of the *United States* government, was prepared to effect Mr. Demjanjuk's removal regardless of the consequences in terms of pain and suffering it would inflict on him, the BIA saw fit to rely upon the legal protections afforded to old and sick defendants ostensibly afforded by the *German* judicial system to prevent in Germany precisely the type of pain and suffering that ICE planned to inflict on Mr. Demjanjuk in the United States. It was an abuse of discretion for the BIA to assume that the *German* criminal justice system would afford Mr. Demjanjuk protection against official infliction of severe pain and suffering that the *United States'* immigration enforcement system enthusiastically inflicted on him in the United States.

In considering whether the BIA's assumption that that the German criminal justice system will afford Mr. Demjanjuk a higher level of protection than is afforded in the United States is an abuse of discretion in light of the evidence presented, this Court (at least for purposes of a stay) has the benefit of Video No. 2

which shows how *United States'* immigration enforcement agents actually treated Mr. Demjanjuk when they arrested him and carried him to the Federal Building in Cleveland on April 14 and the pain and suffering they inflicted. It is difficult to believe that type of conduct by officers of the, but the evidence is before our eyes recorded on Video No. 2.

In light of the evidence before the BIA of the actual conduct of United States immigration enforcement authorities, the BIA's assumption that the *German* criminal justice system would exhibit a higher degree of care and humanity in their treatment of Mr. Demjanjuk was not only naïve, it was an abuse of discretion by the Board in reaching its decision denying the Motion to Reopen.[10]

In order to constitute torture within the meaning of the regulations, the severe pain and suffering has to be inflicted *intentionally* and with a *purpose* to punish or extract information. 8 CFR 1208.18(a)(1). As Mr. Demjanjuk pointed out in his Motion to Reopen to the BIA, the German authorities are unlikely to advertise in the press their intent and purpose in subjecting Mr. Demjanjuk to the severe pain and suffering they clearly are planning for him. The Board's failure to

[10] While the BIA did not have the benefit of Video No. 2, it did have before it ample evidence of Mr. Demjanjuk's serious medical conditions and of the lack of concern by the United States immigration enforcement authorities of the consequences of their action in terms of severe pain and suffering. *See* e.g. the ICE April 3, 2009 denying Mr. Demjanjuk's Application for an Administrative Stay.

draw reasonable inferences from the facts was an abuse of discretion. In this case the facts are compelling.

Even the government in the Opposition it filed at the BIA to Mr. Demjanjuk's Motion to Reopen noted the fact that the German authorities have been less than aggressive in prosecuting "Nazi cases." As the government put it in its Opposition (emphasis added):

> Any argument that Demjanjuk wishes to make about capacity to stand trial is properly made to the German authorities after arrival in Germany. German courts have the authority to dismiss prosecutions on health grounds. Indeed, in Nazi cases, such outcomes have been commonplace in Germany for many decades. [citation omitted]

Accepting the government's characterization of the commonplace approach of the German authorities, we are now presented with the unusual circumstance of the German authorities reaching out to the United States to accept the deportation of a sick, 89 year old man, with the objective of arresting him when he arrives in Germany, incarcerating him and prosecuting him. It is a fair question to ask why the German authorities now seek to reach across 3000 miles of ocean to prosecute a sick 89 year old Ukrainian, a former prisoner of war of the Germans. Because "torture" as defined by the regulations includes a purpose and intent component, the BIA was obligated to consider the motives of the German authorities. The BIA singularly failed to do so, pointing only to the decision of the denaturalization

court in the United States for the proposition that it was not surprising that the German authorities decided to prosecute.

As the government itself recognizes, however, it is more or less common knowledge (though perhaps not arising to a level where a court or the BIA could take judicial notice) that the German authorities have not been aggressive in prosecuting the numerous *German* authors of the many horrors of their World War II occupation of much of Europe, including their deliberate extermination of over 12 million people--Jews, Poles, Russians, Ukrainians and others in concentration camps, death camps, "prisoner of war" camps, and through intentional starvation and garden-variety mass shootings. What accounts for the newly found zeal of the German authorities? Clearly, it is politically easier for the German authorities to reach out to arrest, incarcerate and prosecute an 89 year old, sick former Ukrainian POW -- for the first time to show vigor in prosecuting a "Nazi case" -- to demonstrate their seriousness about dealing with the horrors inflicted on Europe during World War II, than to look closer to home, in their own backyards, for their "quiet neighbors" who clearly are culpable. Mr. Demjanjuk is a very sick man and is unlikely to survive the rigors of arrest, incarceration and trial in Germany. In the meantime, the German authorities, reacting to the pressures brought by the same groups that demanded Mr. Demjanjuk's extradition to and trial in Israel twenty-

four years ago, will be seen to be taking action against and punishing Mr. Demjanjuk for suspected crimes.

It is plainly difficult without a thorough inquiry to obtain direct evidence of the motives of the German authorities. The indirect evidence before the Board, which the Board entirely ignored, strongly supported the proposition that the purpose and intent of the German authorities is to punish Mr. Demjanjuk for suspected crimes though arrest, incarceration and trial--regardless of whether a trial actually results in a verdict.[11] In light of the history of this case, such a purpose and intent on the part of the German authorities is highly likely. We call this Court's attention to its decision in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), where this Court had had the opportunity to inquire in depth into the *political* background of the campaign against Mr. Demjanjuk, 10 F.3d 338 at 354:

> In August of 1978 Congressman Eilberg, the Chairman of an important committee, wrote then Attorney General Bell a letter insisting that Demjanjuk be prosecuted hard because "we cannot afford the risk of losing" the case. n3[12] The trial attorney then in charge of the case, Mr. Parker, wrote in his 1980 memorandum that the denaturalization case could not be dismissed because of factors "largely political and obviously considerable."

[11] Mr. Demjanjuk's German attorneys have asked the Munich prosecutor to send German doctor, qualified to determine whether Mr. Demjanjuk is fit to stand trial under German standards ("Verfahrungsfähigkeit"), to examine Mr. Demjanjuk in Cleveland. The Munich authorities have so far taken no action.

> Other lawyers in OSI wrote memos discussing this case as a political "hot potato" [**54] that if lost "will raise political problems for us all including the Attorney General." (Mendelsohn, then the Director of the office, to Crosland, September 26, 1978, Pet. Exh. 113.) Mr. Ryan, Director of the office, wrote the Assistant Attorney General of the Criminal Division in 1980 that OSI had "secured the support in Congress, Jewish [*355] community organizations, public at large for OSI--press coverage has been substantially favorable and support from Jewish organizations is now secure," but he went on to say that "this support can't be taken for granted and must be reinforced at every opportunity." (Ryan Tr. at 88.) Mr. Ryan also testified that "in 1986, which was the year before the [Israeli] trial [of Demjanjuk], I went to Israel for about 10 days on a lecture tour that was sponsored by the Antidefamation League. . . ." (Ryan Tr. at 90.) It is obvious from the record that the prevailing mindset at OSI was that the office must try to please and maintain very close relationships with various interest groups because their continued existence depended upon it.

In note 3 the Court set out Congressman Eilberg's letter in full. The letter is included here as it illustrates--as it did for the Court in 1993--the type of political pressures that have been exerted in connection with this case:

> August 25, 1978
>
> Honorable Griffin B. Bell Attorney General Department of Justice Washington, D.C.
>
> Dear Mr. Attorney General:
>
> Reports have reached me that deficiencies have become apparent in the preparation of the case of **U.S. v. Demjanjuk**, a denaturalization proceeding against an alleged Nazi war criminal now living in Cleveland, Ohio.

> I wish to express my strong concern over the possible inadequate prosecution of this case. A repeat of the recent Fedorenko adverse decision to the government's case in Florida would nullify and gravely jeopardize the long and persistent efforts of this Subcommittee in ridding this country of these undesirable elements. Lack of preparation and a deep realization of the importance of these proceedings may have cost the government its decision in this case. We certainly would regret seeing this happen again.
>
> The creation of a Special Litigation Unit within INS [predecessor of OSI] was established to bring expertise and organization to this project.
>
> This Unit should be fully entrusted with these cases.
>
> I would strongly urge you to place the direction of the proceedings of the DEMJANJUK case in the hands of the Special Litigation Unit. We cannot afford the risk of losing another decision.
>
> With best wishes.
>
> Sincerely,
>
> JOSHUA EILBERG

There is ample evidence that the *political* campaign against Mr. Demjanjuk continues and that it is now directed at least in part against the German authorities. As recently as yesterday, April 21, 2009, the Associated Press reported *from Berlin* that Efraim Zuroff, the Director of the Simon Wiesenthal Center in Jerusalem, had

announced that Mr. Demjanjuk has been made No. 1 on its list of most wanted war criminals. To quote the AP report (emphasis added):[13]

> BERLIN (AP) -- The Simon Wiesenthal Center has made alleged death camp guard John Demjanjuk No. 1 on its most-wanted list of Nazi war criminals.
>
> Efraim Zuroff, director of the center in Jerusalem, said Tuesday the move *reflects the importance of efforts to deport Demjanjuk (dem-YAHN'yuk) from the US to Germany so he can stand trial.*

This report is striking in its similarity to the types of political pressure this Court showed was brought to bear on the United States' authorities in the first case against Mr. Demjanjuk that led to his extradition to Israel and prosecution there for crimes he did not commit. The action of the German authorities, so inconsistent with their actions with respect to alleged German perpetrators, can only be explained as a response to this type of pressure which is plainly directed to punishing Mr. Demjanjuk for suspected crimes by forcing him to spend his little remaining time on earth in a German jail awaiting trial.

The Board singularly failed to address Mr. Demjanjuk's arguments directed to the purpose and intent of the German authorities in inflicting severe pain and suffering on him. Mr. Demjanjuk plainly raised serious issues on this issue,

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[13] The AP report is found at http://www.google.com/hostednews/ap/article/ALeqM5jzAVqVSHZ3k-eBcFy0UNrts6Lh_QD97MVDLO2. The site was visited 4/22/09 at 10:40 AM.

relying in part upon the government's own factual contentions. By failing to address this evidence and these issues the BIA abused its discretion in denying the Motion to Reopen.

3. Harm to third parties

Granting a stay of removal to permit review of the BIA's April 15 decision denying Mr. Demjanjuk's Motion to Reopen will harm no third parties. Mr. Demjanjuk poses no threat to the United States or anyone in it. He has lived a blameless life here and there is no contention otherwise.

4. The public interest

Congress has clearly expressed its intent that the United States not remove people to countries or environments where they will be subjected to torture. In the case of Mr. Demjanjuk, it is particularly appropriate that this intent be respected. In 1977-1993 a terrible wrong was done to Mr. Demjanjuk. He and his family were subjected to extraordinary stress, pain and suffering in substantial part a direct result of the serious misconduct of attorney representing the United States, against whom, it should be noted, no action was ever taken by the Department of Justice or the respective state bar associations or courts. Mr. Demjanjuk spent five years on death row, sentenced to hang for a crime he did not commit. He was sent

to Israel by the same OSI that now wants to send him to Germany to be tried again, apparently on some of the same charges that were laid against him in Israel.[14]

Whatever the interest OSI now has in seeking to remove Mr. Demjanjuk again, this time to Germany, the source of the horrors of World War II, and whatever the interest of organizations such as the Simon Wiesenthal Center and people such as Efraim Zuroff, the *public* interest does not require this Court to further them.[15] The public interest, as opposed to the parochial interest of the OSI and its supporters, is in an orderly and careful consideration of Mr. Demjanjuk's claims, not in hustling him off in the middle of the night in a private plane attended by medical personnel interested only in keeping him "medically stable" in order to deliver him to the German authorities who clearly have their own agenda.

CONCLUSION

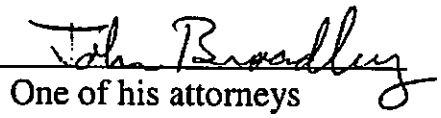
[14] The Israeli Supreme Court itself noted the "double jeopardy" concerns that counseled the Israeli Attorney General not to bring additional charges against Mr. Demjanjuk in Israel. Apparently, double jeopardy concerns are not to be allowed to stand in the way of German prosecution of Mr. Demjanjuk.

[15] One cannot help but notice the enormous resources that the Department of Justice and the Department of Homeland Security have expended, and apparently are prepared to expend in the future, to secure Mr. Demjanjuk's removal from the United States. It is a fair question for investigation whether this extraordinary effort is driven by OSI's desire to remove from the United States a symbol of OSI's misconduct that occurred 30 years ago, or by a desire to remove from the United States a helpless old man who presents no conceivable danger to anyone.

For the foregoing reasons, John Demjanjuk, the petitioner, respectfully requests that the Court enter a stay pending review of the April 15, 2009 decision of the Board of Immigration Appeals denying Mr. Demjanjuk's Motion to Reopen.

Respectfully submitted,

JOHN DEMJANJUK

By: 
One of his attorneys

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Dated: April 22, 2009

PROOF OF SERVICE

I hereby certify that on this 22nd day of April 2009 I caused copies of the foregoing:

Petition for Review
Motion for Leave to Proceed in Forma Pauperis
Motion for Stay Pending Review

to be served on counsel and parties listed below by Federal Express addressed as follows:

Eli Rosenbaum
Director, Office of Special Investigations
1301 New York Avenue, NW
Suite 200
Washington, D.C. 20530

Office of Chief Counsel, DHS/ICE
1240 East 9th Street, Room 585
Cleveland, Ohio 44199

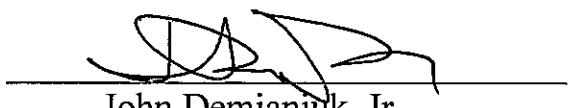
In addition, a copy of the Petition for Review was served on the Attorney General as required by 8 U.S.C. 1252(b)(3)(A) by depositing a copy thereof in the United States mail addressed to :

Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
10th & Constitution Avenue, NW
Washington, D.C. 20530

Declaration Pursuant to 28 USC 1746

I declare under penalty of perjury that the foregoing is true and correct.

Executed April 22, 2009



John Demjanjuk, Jr.

ATTACHMENT A

John H. Broadley
John H. Broadley & Associates, P.C.
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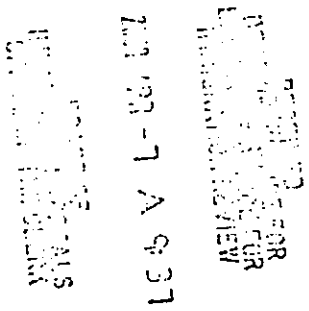
Washington, D.C. 20007

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of John Demjanjuk	File No. A 08 237 417
In removal proceedings	



RESPONDENT'S MOTION TO REOPEN

John Demjanjuk, the respondent, by his undersigned attorneys, hereby moves the Board of Immigration Appeals ("Board") for an order reopening the removal proceedings against him to hear evidence of changed country conditions in Germany, one of the countries to which he has been ordered removed, that warrant deferral of removal pursuant to the Convention Against Torture.

1. Prior Proceedings

The Chief Immigration Judge entered a final order December 28, 2005 that Mr. Demjanjuk be removed to Ukraine, Poland or Germany and denied Mr. Demjanjuk's application for deferral of removal to Ukraine pursuant to the Convention Against Torture. That decision was upheld by the Board of Immigration Appeals on December 21, 2006 (*see* Attachment No. 1), and affirmed by the United States Court of Appeals for the Sixth Circuit on January 30, 2008, *Demjanjuk v. Mukasey*, 514 F.3d 616 (6th Cir. 2008). The Supreme Court denied certiorari on May 19, 2008, *Demjanjuk v. Mukasey*, 128 S.Ct. 2491 (mem.), 171 L.Ed.2d 780.

Mr. Demjanjuk is not a subject of any pending criminal proceeding under the Act. As is more fully set forth below, Mr. Demjanjuk appears to be the subject of a criminal investigation in Germany which has led to the issuance of an arrest warrant by a German court in Munich, Germany.

2. Jurisdiction of the Board[1]

This is a motion to reopen the removal proceeding for the sole purpose of hearing evidence of changed country conditions in Germany, one of the countries to which the Immigration Court ordered Mr. Demjanjuk removed. Because the Immigration Court's removal order was appealed to the Board, the Board has jurisdiction to reopen a case in which it has

[1] Respondent mistakenly filed his Motion to Reopen and Emergency Motion for a Stay with the Immigration Court.

rendered a decision. 8 CFR 1003.2(a). This interpretation is supported by Section 5.2(a)(iii)(A) of the BIA Practice Manual which says that:

> As a general rule, where an appeal has been decided by the Board and no case is currently pending, a motion to reopen or a motion to reconsider may be filed with the Board. . . .

Pursuant to 8 CFR 1003.2(c)(3)(ii) the time limits of 8 CFR 1003.2(c)(2) do not apply when reopening is sought to assert changed country circumstances applicable to a claim under the Convention Against Torture. Moreover, no filing fee is required for a motion to reopen solely on these grounds. 8 CFR 1003.8.

3. Changed country circumstances

The Immigration Court decided Mr. Demjanjuk's Convention Against Torture ("CAT") claim in its December 28, 2005 decision. Mr. Demjanjuk's CAT claim at that time related only to removal to Ukraine. As will be outlined below, at that time there was no reason for Mr. Demjanjuk to believe that if he were removed to Germany he would be subject to arrest, imprisonment, or prosecution. Moreover, even if he had been arrested and imprisoned at that time, while his health was not good and certainly would not have withstood the harsh conditions in Ukrainian jails, there was no reason to believe that his physical condition was such that the incarceration or trial in Germany would have inflicted severe physical and mental anguish on him amounting to torture within the meaning of the regulations. Both of these conditions have changed.

Changed German Intentions

The first change since adjudication of the 2005 CAT claim is in German intentions. The German authorities have made it clear that they intend to arrest, incarcerate and try Mr. Demjanjuk if he is removed to Germany. On March 10, 2009 a German Judge issued an arrest

order for Mr. Demjanjuk on suspicion of assistance in murder.[2] It is now clear that unlike the situation that existed in 2005, Mr. Demjanjuk now faces the prospect of arrest, incarceration and trial if he is removed to Germany.

Changed Health Conditions

While Mr. Demjanjuk's health was not good at the time of the 2005 CAT claim for withholding removal to Ukraine, it has deteriorated significantly in the intervening four years. Attached hereto are medical reports on Mr. Demjanjuk that show the serious state of his health (*see* Attachment No. 2):

A. Dr. Wei Lin (MD at the Cleveland Clinic Cancer Center) showing that Mr. Demjanjuk is suffering from and being treated for *Myelodysplastic Syndrome (MDS), Persistent Anemia and Chronic Renal Failure.*

B. Dr. Keck Chang, MD who diagnosed Mr. Demjanjuk with *Chronic Kidney Disease* (CKD Stage 3), *Anemia* associated with MDS and CKD, *Hyperoxaluria* and *Kidney Stones.*

C. Dr. Timmappa Bidari, MD confirms that Mr. Demjanjuk has *Myelodysplastic Syndrome, Anemia and leucopenia* secondary to the MDS.

D. Dr. Giuseppe Antonelli (an arthritis specialist) reports that Mr. Demjanjuk is suffering from *arthritis* and *severe spinal stenosis.*

On April 2, 2009, the Immigration and Customs Enforcement Division of the Homeland Security Department ("ICE") sent a doctor to Mr. Demjanjuk's home to give him a medical examination to determine whether it would be safe for him to travel to Germany. While ICE has not provided Mr. Demjanjuk with a copy of the medical report, Mr. John Demjanjuk, Jr., Respondent's son, video taped the examination. In addition to the ICE doctor, other representatives of ICE were present at the examination and video taping. Mr. Demjanjuk Jr. has

[2] Mr. Demjanjuk does not have a certified English translation of this document. The Office of Special Investigations has admitted this, however, in its filing with the Immigration Court on April 3, 2009 in opposition to Respondent's Motion to Reopen mistakenly filed there. See Government's Opposition at p. 4.

submitted a video clip showing the final stages of that examination. *See* Declaration of John Demjanjuk, Jr. (Attachment No. 3) and the attached video clip attached thereto.

4. Planned German actions will amount to torture

It is plain from viewing the video clip that Mr. Demjanjuk is in very poor health generally, and that his back problems (severe spinal stenosis) are causing him severe pain making it difficult if not impossible for him to move himself around. It is equally clear that putting someone in that state of health in a jail environment will subject him to very severe physical pain, and that forcing him to attend court for weeks or months of a trial will be an excruciating ordeal. The video clip alone makes it clear that the physical requirements for torture, "infliction of severe pain or suffering" (8 CFR 1208.18), would be met by confinement of Mr. Demjanjuk in jail conditions and compounded if he were required to attend a protracted trial.

There is also a "purpose" and an "intent" requirement in the regulations defining torture. The purpose and intent of the German authorities obviously must be inferred by the Board from the surrounding circumstances. The German authorities are scarcely going to announce to the press that they have decided to throw Mr. Demjanjuk in jail and force him to stand trial in order to subject him to excruciating pain and that they are doing this in order to be seen to be punishing him because they think he worked for the Germans in 1942 and 1943 at a German death camp. The Board can, however, draw reasonable inferences regarding German intentions from several facts.

In its Opposition filed in the Immigration Court on April 3, the Government argued (Government Opposition p.10) (emphasis added):

> Any argument that Demjanjuk wishes to make about capacity to stand trial is properly made to the German authorities after arrival

> in Germany. German courts have the authority to dismiss prosecutions on health grounds. Indeed, in Nazi cases, such outcomes have been commonplace in Germany for many decades. [citation omitted]

Accepting the truth of the Government's contention in the underscored language, the Board must ask itself, why the German authorities are now seeking to accept deportation of Mr. Demjanjuk, an 89 year old man who is obviously in poor health. Even a casual review of the video clip must raise serious doubts about Mr. Demjanjuk's ability to withstand a trial. If Mr. Demjanjuk cannot withstand the rigors of a trial (and the *innuendo* in the Government's statement above is that a generous standard has historically been applied in Germany to "Nazi cases"), why does the German government want to bring him to Germany where he is likely ultimately to be found unable to stand trial and then would become a ward of the German taxpayer? Why has the German government not availed itself of the opportunity to have an German official doctor conduct a medical examination to determine whether Mr. Demjanjuk is capable of standing trial in Germany before it accepts his deportation.[3]

There are two possible logical conclusions that the Board can draw from these facts. The first is that the German government simply wants to relieve the United States of the burden of supporting a sick, 89 year old man who has no connection with Germany other than that he was taken prisoner by the Germans in 1942 and is alleged to have worked for the Germans in 1942 - 1945. Under this analysis, the German authorities will (i) apply what the Government views as their generous standard to determine whether Mr. Demjanjuk is capable of standing trial, (ii) find him unable to do so, and (iii) turn the burden of supporting Mr. Demjanjuk for the rest of his life

[3] Both Mr. Demjanjuk's German counsel and his United States counsel have made it clear to the German authorities that Mr. Demjanjuk is available for a medical exam by the German authorities at any time, either at his home or at a suitable Cleveland hospital. The German authorities have not responded to the offer.

over to the German taxpayer. Respondent suggests that such a conclusion, while consistent with the facts as we know them, would be fanciful.

The other conclusion that the Board can draw from the facts is that the German authorities do not care whether Mr. Demjanjuk is ultimately convicted or acquitted or even whether he is actually brought to trial. The German authorities want to bring him to Germany, arrest him, incarcerate him and bring him to trial if possible in order to be seen to be punishing Mr. Demjanjuk, at least to the extent of subjecting him to the severe physical and mental pain that pre-trial incarceration and a trial will cause. While a medical exam at some point before trial may well result in the dismissal of the case (at least if the *innuendo* in the Government's statement about German practice in this respect is correct), for many months and perhaps years Mr. Demjanjuk would be subjected to the severe physical and mental pain of incarceration and the German authorities would be viewed favorably in some quarters for "punishing" him for his alleged crimes. The Board can fairly conclude from the facts that the German authorities have both the purpose (punishment) and the specific intent to inflict severe physical and mental pain on Mr. Demjanjuk for that purpose.

Accompanying this Motion to Reopen is an Application for Deferral of Removal Pursuant to the Convention Against Torture on Form. I-589. (*See* Attachment No. 4) Part C5 of that sworn Application explains why Mr. Demjanjuk did not make this claim with respect to torture in Germany at the time the original Application for Deferral of Removal was filed on October 7, 2005. Part B4 of that standard form application further explains the changed circumstances. Those parts of Mr. Demjanjuk's Application are reproduced below for the convenience of the Board. The entire new I-589 is submitted in support of this Motion to Reopen.

Supplementary Response to Part C5

Removal proceedings were commenced against me in 2004 to remove me to Ukraine, Poland or Germany. I applied for deferral of removal to Ukraine under the Convention Against Torture based on the climate of hate that the Department of Justice had created against me, and Ukraine's history and practice of torture in its prisons. At that time, I had no reason to believe that if I were removed to Germany I would be arrested or in the event of arrest subjected to severe mistreatment amounting to torture. Within the past few weeks it has become apparent that the German government has decided to accept deportation and to arrest, imprison and try me for some of the same crimes for which I was tried and acquitted in Israel. Arrest, imprisonment and trial in Germany for crimes for which I have already been acquitted would amount to severe mistreatment amounting to torture under the Convention Against Torture in view of my age (89 on 4/3/09) and my poor health as outlined in the attached medical reports. On information and belief, these changed circumstances in Germany which will result in my torture have been brought about by actions of representatives of the Department of Justice.

In summary, at the time I filed my original application for deferral of removal, I had no reason to believe that removal to Germany (as opposed to Ukraine) would result in actions by the German authorities that would amount to torture.

Supplementary Response to Part B 4

New Developments and Changed Conditions Since Original Application for Deferral

Since I filed my original application for deferral of removal pursuant to the Convention Against Torture ("CAT") on October 7, 2005 several developments have occurred that require the filing of an additional application, or the substantial amendment of the original application. These new developments are treated as the basis for a new application. If the proper procedural avenue is to seek to reopen the proceeding and amend the existing application, I request that this I-596 be treated as a motion to reopen and an amendment to the CAT application filed with the Immigration Court on October 7, 2005.

1. Decision by the German authorities to arrest, jail and prosecute. Since my October 7, 2005 application, on information and belief, the Federal Republic of Germany has decided to accept my deportation to Germany. In addition, the State prosecutor in Munich has issued a warrant for my arrest and, again on information and belief, the State prosecutor intends to have me arrested when I enter Germany, jailed, and tried as an accessory to murder. Based on information I have received from my attorney in Germany, the State prosecutor's theory is novel and has not previously been used by the German authorities in any prosecution of alleged concentration camp guards in that country. In 2005 there appeared little or no chance that even if I were deported to Germany the German authorities would either arrest, jail or prosecute me. Developments in the past several weeks have changed that situation as I have outlined above.

2. Significant health deterioration since October 2005. Since my October 7, 2005 application my health has deteriorated significantly as follows:

- I am now almost four years older, which at age 89 is a significant change.
- I am suffering from and being treated for Myelodysplastic Syndrome (MDS) which is a disorder of the bone marrow and a pre-cursor to leukemia. I receive weekly treatment with Procrit for this condition and periodically have required blood transfusions.
- I am suffering from and being treated for Chronic Kidney Disease (CKD Stage 3).
- I am suffering from anemia and leucopenia associated with the MDS and CKD conditions.
- I am suffering from and being treated for hyperoxaluria and kidney stones.
- I am suffering from and being treated for arthritis, gout and spinal stenosis.

With the exception of the arthritis, gout and spinal stenosis, these conditions have manifested themselves since my October 2005 CAT application. The arthritis, gout and spinal stenosis have become much worse and seriously impede my ability to move and take care of myself. I frequently need assistance in rising from a chair and extended sitting is very painful. Copies of the most recent medical reports supporting this description of my present state of health are attached.

Why Arrest, Incarceration and Trial in Germany would be Torture

My present physical condition is described above. I will be 89 years old on April 3, 2009 and in general my health is poor. I suffer from the conditions described above. I am physically very weak and experience severe spinal, hip and leg pain which limits mobility and causes me to require assistance to stand up and move about. Spending 8 to 12 hours in an airplane seat flying to Germany would be unbearably painful for me.

I am very familiar with life as a prisoner. First I was a prisoner-of-war of the Germans after my capture in 1942, and subsequently I was a prisoner of the Israelis held in solitary confinement in an Israeli jail cell from early 1986 to 1993. During my time in solitary in an Israeli jail, they tried me, sentenced me to death, and ultimately acquitted me when incontrovertible evidence was presented that "Ivan the Terrible" was an individual named "Ivan Marchenko." As a prisoner of the Germans I was aged 22 - 25. As a prisoner of the Israelis I was aged 56 - 63 and in reasonably good physical and mental health. I am now age 89 and my health is poor. I could not look after myself in an ordinary jail cell as I need assistance to perform many functions, particularly those requiring rising, standing, and moving around. Incarceration under conditions similar to those I experienced in Israel would subject me to severe physical pain and suffering.

Spending 8 years in solitary confinement, 6 of them under sentence of death, is a psychological experience that leaves permanent scars, fears and vulnerabilities. I have serious doubts whether I could withstand incarceration and the terrible psychological strain of another trial at my age and in my weakened physical state. After my experience in Israel, the prospect of another "show trial," complete with emotional witnesses testifying to what they want to be true, not to what is true, is a nightmare that is unimaginable to someone who has not experienced it.

Finally, I will raise the issue of the effect of another round of arrest, jail and trials on my family. The effect of the events from 1976 to today on my wife of over 60 years, and my three children and their families has been traumatic. My son, John Demjanjuk, Jr., has lived with the Justice Department's vendetta against me since he was 11 years old, through his teenage years and for all of his adult life. He is now 43 years old. My daughters were older when it began in 1976, but the impact on their lives and families may have been even more severe. I have been subjected to three major trials. The first of these was from 1977 when the Justice Department filed its denaturalization complaint to early 1986 which I was extradited to Israel. The second of these was from early 1986 when I was extradited to Israel and tried and convicted of murder to 1993 when the Israeli Supreme Court acquitted me and sent me back to the United States. The third was from 1999 when the Justice Department filed its second denaturalization complaint against me to today when I am facing the prospect of deportation to Germany and a likely fourth major trial there. The prospect of my family having to go through this experience for a fourth time is intensely painful to me.

Why Would the German Authorities Subject Me to this Treatment

This question calls for some speculation on the motives of the German authorities. I understand that the Office of Special Investigations (OSI), which has been the center of the Justice Department vendetta against me, has been trying to induce other countries (including Germany) to accept my deportation and to prosecute me. After the US Court of Appeals found that Office of Special Investigations' attorneys had committed a fraud on the court by withholding exculpatory evidence from the defense (and from the Israeli prosecutors), I did not expect OSI to rest until they had denaturalized me, deported me and put me on trial somewhere for something. I am sure that the record of the efforts of OSI to do this will eventually come to light.

The motivation of the German authorities is more difficult to understand. We have read in the press that certain organizations have been bringing pressure on the German authorities to undertake proceedings against me. This is consistent with the activities of these same organizations in promoting my extradition to Israel and trial there as "Ivan the Terrible." Why the German authorities should have yielded to such pressure is more difficult to understand. One possible reason is that the German authorities have not aggressively prosecuted German war criminals and have been subjected to considerable criticism on this account. It is possible that the German authorities see a prosecution of me as means to draw attention away from their past approach. Whether the German authorities are responding to outside pressure (including pressure from OSI) or are trying to divert attention from their own prior practices, they appear determined to arrest, jail and prosecute me despite the pain and suffering it will cause, and it can be inferred because of the pain and suffering it will cause me and my family.

Summary

In summary, the German authorities appear determined to arrest, incarcerate and try me again for alleged war crimes, notwithstanding the Israeli Supreme Court acquitted me of charges that included the same factual allegations that the German prosecutor appears to be planning. At my age, in light of my poor physical condition and the traumatic experiences I have undergone at

the hands of the US Justice Department, the Israelis, and the US Justice Department a second time, this will expose me to severe physical and mental pain that clearly amounts to torture under any reasonable definition of the term. The effect is magnified by the serious adverse effect that further proceedings will have on my family.

Mr. Demjanjuk's statements in response to Question C5 and B4 of the form I-589 adequately explain the changed country circumstances that clearly show that his deportation to Germany under those changed circumstances would now violate the Convention Against Torture.

CONCLUSION

Wherefore, John Demjanjuk respectfully requests that the Board reopen this removal proceeding to consider his request for deferral of removal to Germany under the Convention Against Torture based on changed country circumstances as set forth above and in the accompanying exhibits and grant that request.

Respectfully submitted,

JOHN DEMJANJUK

By: John Broadley
One of his attorneys

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Dated: April 7, 2009

ATTACHMENT NO. 1

BIA DECISION IN THE CASE

FAX TRANSMISSION

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
5107 LEESBURG PIKE, SUITE 2000
FALLS CHURCH, VA 22041

PHONE.....703-605-1007

TO: John Broadley	DATE: 12-21-06
OFFICE: Attorney for Respondent	PAGES: 20
FAX#: (202) 333-5685	TIME: 2:42p.m.
PHONE#: (202) 333-6025	
FROM: CAMELLA , DOCKET TEAM	

Board Of Immigration Appeals/Clerks Office
Docket Team

Phone: (703) 305-0445
Fax: (703) 605-5235

SUBJECT: COPY OF BOARD DECISION FOR A08-239-417 , DEMJANJUK, John

COMMENTS:

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Broadley, John, Esquire
1054 31st Street NW, Suite 200
Washington, DC 20007-0000

ICE Office of Chief Counsel/CLE
1240 E. 9th St., Suite 519
Cleveland, OH 44199

Name: DEMJANJUK, JOHN

A08-237-417

Date of this notice: 12/21/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
HURWITZ, GERALD S.
MILLER, NEIL P.
OSUNA, JUAN P.

gilmorec

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A08 237 417 - Cleveland Date: DEC 21 2006

In re: JOHN DEMJANJUK a.k.a. John Iwan Demjanjuk

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John Broadley, Esquire

ON BEHALF OF DHS: Stephen Paskey
Senior Trial Attorney

CHARGE:

Notice: Sec. 237(a)(4)(D), I&N Act [8 U.S.C. § 1227(a)(4)(D)] - Inadmissible at time of entry or adjustment of status under section 212(a)(3)(E)(i), I&N Act [8 U.S.C. § 1182(a)(3)(E)(i)] - Participated in Nazi persecution

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 13 of the Displaced Persons Act (DPA), 62 Stat. at 1013 (1948)

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 10 of the DPA, 62 Stat. at 1013 (1948)

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 13(a) of the Immigration Act of 1924, 43 Stat. 153 (1924)

APPLICATION: Deferral of removal under the Convention Against Torture

By decision dated June 16, 2005, the Immigration Judge denied the respondent's motion to reassign this case to a different Immigration Judge ("CIJ Recusal Dec."). In a separate decision issued on June 16, 2005, the Immigration Judge granted the government's motion for application of collateral estoppel and judgment as a matter of law, and denied the respondent's motion to terminate removal proceedings ("CIJ Collateral Estoppel Dec."). By decision dated December 28, 2005, the Immigration Judge denied the respondent's application for deferral of removal under the Convention Against Torture, and ordered him

removed from the United States to Ukraine, or in the alternative to Germany or Poland ("CIJ Deferral Dec."). On January 23, 2006, the respondent filed a Notice of Appeal ("NOA") with the Board of Immigration Appeals, arguing that the Immigration Judge's decisions were in error.[1] The appeal will be dismissed.

I. BACKGROUND

The respondent is a native of Ukraine who first entered the United States on February 9, 1952, pursuant to an immigrant visa issued under the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 219 ("DPA"). He was naturalized as a citizen of the United States in 1958. Exh. 5B.

On May 19, 1999, the government filed a three-count complaint in the United States District Court for the Northern District of Ohio seeking revocation of the respondent's citizenship. Exh. 5A. Each count alleged that the respondent's naturalization had been illegally procured and must be revoked pursuant to section 340(a) of the Immigration and Nationality Act ("INA" or "the Act"), 8 U.S.C. § 1451(a), because the respondent was not lawfully admitted to the United States as required by section 316 of the Act, 8 U.S.C. § 1427(a). Count I asserted that the respondent was not eligible for a visa because he assisted in Nazi persecution in violation of section 13 of the DPA. Count II asserted that the respondent was not eligible for a visa because he had been a member of a movement hostile to the United States, also in violation of section 13 of the DPA. Count III asserted that the respondent was ineligible for a visa or admission to this country because he procured his visa by willfully misrepresenting material facts.

Following a trial that began on May 29, 2001, the district court ruled in the government's favor on all three counts. Exh. 5B. In doing so, the district court issued separate findings of fact and conclusions of law, and a "Supplemental Opinion" in which the court addressed the respondent's defenses. Exhs. 5B and 5C. The district court found that the respondent served willingly as an armed guard at two Nazi camps in occupied Poland (the Sobibor extermination center and the Majdanek Concentration Camp) and at the Flossenburg Concentration Camp in Germany. Exh. 5B, Findings of Fact ("FOF") 100-05, 123-35, 162-68, 291.

The district court found that Sobibor was created expressly for the purpose of killing Jews, that thousands of Jews were murdered there by asphyxiation with carbon monoxide gas, and that the respondent's actions as a guard there contributed to the process by which these Jews were murdered. Exh. 5B, FOF 128-32. The district court also found that a small number of Jewish prisoners worked as forced laborers at Sobibor, and that the respondent guarded these forced laborers, "compelled them to work, and prevented them from escaping." Exh. 5B, FOF 133-34. The district court found that Jews, Gypsies, and other civilians were confined at Majdanek and Flossenburg because the Nazis considered them to be "undesirable," and that prisoners at both camps were subjected to inhumane treatment, including

[1] We note that the respondent filed an interlocutory appeal regarding the Immigration Judge's June 16, 2005, decision denying his motion asking the Immigration Judge to recuse himself from the case and have it randomly reassigned. In an order dated September 6, 2005, the Board declined to consider the interlocutory appeal and returned the record to the Immigration Court without further action.

forced labor, physical and psychological abuse, and murder. Exh. 5B, FOF 102-03 (Majdanek); 166-67 (Flossenburg). The district court further found that by serving as an armed guard at each camp, the respondent prevented prisoners from escaping. Exh. 5B, FOF 105, 168.

The district court concluded that as a result of this wartime service to Nazi Germany, the respondent was ineligible for the DPA visa under DPA § 13 because (1) he had assisted in Nazi persecution and (2) he had been a member of a movement hostile to the United States. Exh. 5B, Conclusions of Law ("COL") 46, 56. In addition, the district court concluded that the respondent was ineligible for a visa or admission to the United States because he willfully misrepresented his wartime employment and residences when he applied for a DPA visa. Exh. 5B, COL 68.

The district court's factual findings with regard to the respondent's wartime Nazi service rested primarily on a group of seven captured wartime German documents which, according to the court's findings, identified the respondent by, among other things, his name, date of birth, nationality, father's name, mother's name, military history, and physical attributes, including a scar on his back. One of the German documents was a *Dienstausweis*, or Service Identity Card, identifying the holder as guard number 1393 at the Trawniki Training Camp (the "Trawniki card"). In addition to identifying information, the Trawniki card contains a photograph that the court found resembles the respondent and a signature in the Cyrillic alphabet that transliterates to "Demyanyuk." Exh. 5B, FOF 2-19.

In a decision dated April 20, 2004, the United States Court of Appeals for the Sixth Circuit rejected the respondent's claims and affirmed the district court's decision in all respects. *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir. 2004), *cert. denied*, 543 U.S. 970 (2004). On December 17, 2004, the Department of Homeland Security served the respondent with a Notice to Appear ("NTA") charging that he is removable under the above-captioned charges. Michael J. Creppy, who was then the Chief Immigration Judge, assigned the case to himself.[2]

On February 25, 2005, the government filed a motion asking the immigration court to apply collateral estoppel to the findings of fact and conclusions of law in the denaturalization case, and to hold that the respondent is removable as a matter of law on the charges contained in the NTA. Exh. 5. On April 26, 2005, the respondent filed a motion to reassign the case to a randomly-selected judge at the Arlington Immigration Court. Exh. 9.

On June 16, 2005, the Chief Immigration Judge denied the respondent's motion to reassign, granted the government's motion to apply collateral estoppel, and held that the respondent was removable as charged. Exhs. 19 and 20. The Chief Immigration Judge also held that, as an alien who assisted in Nazi persecution, the respondent was barred as a matter of law from all forms of relief from removal other than deferral of removal under the Convention Against Torture. Exh. 20.

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[2] All references in this decision to the "Chief Immigration Judge" are to Michael J. Creppy, who was Chief Immigration Judge at the time of the respondent's removal hearing.

Thereafter, the respondent filed an application for deferral of removal. Exh. 31. On December 28, 2005, the Chief Immigration Judge denied the respondent's application for deferral of removal on the ground that he failed to meet his burden of proving: 1) that he was likely to be prosecuted if removed to Ukraine; 2) that if prosecuted he was likely to be detained; and 3) that if prosecuted and detained, he was likely to be tortured. The Chief Immigration Judge ordered the respondent removed to Ukraine, with alternate orders of removal to Germany or Poland. The respondent filed a timely appeal to the Board of Immigration Appeals.

II. THE CHIEF IMMIGRATION JUDGE'S DECISIONS

A. The Immigration Judge's June 16, 2005, Decision Regarding the Assignment of the Respondent's Case

The Chief Immigration Judge assigned himself to hear the respondent's case. On April 26, 2005, the respondent filed a Motion to Reassign to Arlington Immigration Judge. The respondent raised three issues in support of his motion: 1) that the Chief Immigration Judge lacked the authority to preside over removal proceedings; 2) that the Chief Immigration Judge should recuse himself because a reasonable person would question his impartiality; and 3) that due process requires random reassignment to an Arlington Immigration Court Judge.

In a decision dated June 16, 2005, the Chief Immigration Judge denied the respondent's motion, deciding that 1) he did have the authority to conduct removal proceedings; 2) despite the respondent's allegations to the contrary, recusal was not warranted because a reasonable person, knowing all of the relevant facts, would not reasonably question his impartiality; and 3) due process did not require random Immigration Judge assignment of the respondent's removal proceedings.

B. The Immigration Judge's June 16, 2005, Decision Regarding Collateral Estoppel

On February 21, 2002, the United States District Court for the Northern District of Ohio, Eastern Division, entered judgment revoking the respondent's United States citizenship. *United States v. Demjanjuk*, No. 1:99CV1193, 2002 WL 544622 (N.D. Ohio Feb. 21, 2002) (unpublished decision). The United States Court of Appeals for the Sixth Circuit affirmed this decision on April 30, 2004. *United States v. Demjanjuk*, 367 F.3d 623. On February 12, 2003, the respondent filed a motion for relief pursuant to Fed.R.Civ.P. 60(b). The district court denied the motion on May 1, 2003, and the United States Court of Appeals for the Sixth Circuit affirmed the decision on April 20, 2005. *United States v. Demjanjuk*, 128 Fed. Appx. 496, 2005 WL 910738 (6th Cir. 2005).

On February 25, 2005, the government filed a Motion for the Application of Collateral Estoppel and Judgment as a Matter of Law and a brief in support of the motion. The government contended that each of the factual allegations set forth in the NTA was litigated and decided during the respondent's

denaturalization proceedings and that, with the exception of allegation number 22,[3] those facts were necessary to the judgment in that case. Thus, the government argued that the respondent should be precluded from contesting the issues in removal proceedings. The government also argued that collateral estoppel precluded the respondent from relitigating the legal conclusions in the denaturalization proceeding concerning his eligibility for a DPA visa and the lawfulness of his admission to the United States.

The Immigration Judge found that collateral estoppel did apply to all of the allegations of fact, except number 22, and to the charges contained in the NTA. Specifically, the Immigration Judge found that in the removal proceedings before him, the government sought to remove the respondent based on the same factual and legal issues presented in the denaturalization case. The Immigration Judge went through each allegation of fact at issue, and determined that the court had reached a decision on each one, and that every fact alleged in the NTA (except allegation number 22) was necessary and essential to the district court's judgment revoking the respondent's citizenship. Therefore, the Immigration Judge found that the respondent was collaterally estopped from relitigating the factual and legal issues presented, and that he was removable pursuant to the four charges of removability.

C. The Immigration Judge's December 28, 2005, Decision Regarding Relief from Removal

The Immigration Judge noted that the respondent's application for deferral of removal is based on three underlying premises: 1) prisoners in Ukraine are frequently subjected to serious abuse or torture, 2) persons who are potentially embarrassing to the Ukranian government are at risk of physical harm and death, and 3) he is uniquely at risk of torture if he is removed to Ukraine. The Immigration Judge found that the evidence of record did not support a finding that the respondent would be prosecuted in Ukraine because of his Nazi past. In reaching this decision, the Immigration Judge noted that Ukraine has not charged, indicted, prosecuted, or convicted a single person for war crimes committed in association with the Nazi government of Germany. The Immigration Judge also found that the evidence of record did not support a finding that the respondent would likely be detained while awaiting trial or as a result of conviction. Finally, the Immigration Judge found the respondent's assertion that he would likely be tortured if taken into custody in Ukraine to be speculative and not supported by the record. For these reasons, the Immigration Judge denied the respondent's application for deferral of removal because he found that he had not established that he was more likely than not to be tortured if removed to Ukraine.

III. DISCUSSION

On appeal the respondent argues that: 1) the Chief Immigration Judge has no jurisdiction to conduct removal proceedings; 2) the Chief Immigration Judge improperly refused to recuse himself as required by applicable law; 3) the Chief Immigration Judge improperly refused to assign the respondent's case on a random basis to an Immigration Judge sitting in the Arlington, Virginia Immigration Court with responsibility for cases arising in Cleveland, Ohio; 4) the Chief Immigration Judge erroneously found that certain facts

[3] Allegation 22 in the Notice to Appear reads as follows: "Your continued, paid service for the Germans, spanning more than two years, during which there is no evidence you attempted to desert or seek discharge, was willing."

relevant to the removability issue had been established by collateral estoppel; and 5) the Chief Immigration Judge erroneously found that the respondent was not eligible for deferral of removal pursuant to the Convention Against Torture. Each of these arguments is addressed below.

A. The Power of the Chief Immigration Judge to Conduct Removal Proceedings

The respondent argues that the position of Chief Immigration Judge is purely administrative, i.e., that the regulations do not confer on the Chief Immigration Judge the powers of an Immigration Judge to conduct hearings, and therefore the Chief Immigration Judge was without authority to conduct removal proceedings in this case. We disagree.

The Attorney General has been vested by Congress with the authority to conduct removal proceedings under the INA and to "establish such regulations" and "delegate such authority" as may be needed to conduct such proceedings. *See* section 103(g)(2) of the Act; 8 U.S.C. § 1103(g)(2). In 1983, the Attorney General created the Executive Office for Immigration Review ("EOIR") to carry out this function. 48 Fed. Reg. 8038 (Feb. 25, 1983). The authority of various officials within EOIR, including Immigration Judges and the Chief Immigration Judge, is discussed in the regulations at 8 C.F.R. §§ 1003.1 through 1003.11.

The duties of the Chief Immigration Judge are set forth as follows:

> The Chief Immigration Judge shall be responsible for the general supervision, direction, and scheduling of the Immigration Judges in the conduct of the various programs assigned to them. The Chief Immigration Judge shall be assisted by Deputy Chief Immigration Judges and Assistant Chief Immigration Judges in the performance of his or her duties. These shall include, but are not limited to:
>
> (a) Establishment of operational policies; and
> (b) Evaluation of the performance of Immigration Courts, making appropriate reports and inspections, and taking corrective action where indicated.

8 C.F.R. § 1003.9.

We reject the argument that the regulatory provision which sets forth the duties of the Chief Immigration Judge is a comprehensive grant of authority which precludes him from performing any other duties. The regulation sets forth only some of the specific responsibilities and duties assigned to the Chief Immigration Judge. However, the explicit language of the regulation makes clear that the Chief Immigration Judge's duties are "not limited to" those explicitly referenced in the regulation. Therefore, we must determine if conducting removal proceedings falls within the other duties for which the Chief Immigration Judge is responsible.

Pursuant to 8 C.F.R. § 1003.10, Immigration Judges are authorized to preside over exclusion, deportation, removal, and asylum proceedings and any other proceedings "which the Attorney General may assign them to conduct." "The term *immigration judge* means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service." 8 C.F.R. § 1001.1(l).

The Chief Immigration Judge is an attorney whom the Attorney General appointed as an administrative judge within the Executive Office for Immigration Review. In this context, we note that his position description indicates that the Chief Immigration Judge's "occupational code" is "905," which is the code for attorney. Exh. 19A. The Chief Immigration Judge is also "qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act" as required by the regulation. That he is considered qualified to conduct such proceedings is manifest by the fact that his position description, signed by the director of EOIR, the Attorney General's delegate, explicitly provides that "[w]hen called upon, [the Chief Immigration Judge] performs the duties of an immigration judge in areas such as exclusion proceedings, discretionary relief from deportation, claims of persecution, stays of deportation, recission of adjustment of status, custody determinations, and departure control." Exh. 19A.[4] Because the Chief Immigration Judge is an attorney appointed by the Attorney General's designee (the Director of EOIR) as an administrative judge qualified to conduct removal proceedings under section 240 of the Act, we conclude that he is an Immigration Judge within the meaning of 8 C.F.R. § 1001.1(1), and therefore had the authority to conduct the removal proceedings in this case.[5]

B. Recusal of the Chief Immigration Judge

The respondent argues that the Chief Immigration Judge should have recused himself from hearing this case because a reasonable person, possessed of all relevant facts, might reasonably question his impartiality. Specifically, the respondent asserts that because the Chief Immigration Judge wrote a law review article addressing the treatment of Nazi war criminals under United States immigration law, and

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[4] The position description states that "[w]hen called upon, [the Chief Immigration Judge] performs the duties" of an Immigration Judge. However, there is no statutory or regulatory authority requiring a higher authority in EOIR or the Department of Justice to "call upon" the Chief Immigration Judge to act as an Immigration Judge before he has the authority to do so. Therefore, we reject the respondent's suggestion that the authority of the Chief Immigration Judge is limited based on the language in the position description. Instead, the language of the position description simply acknowledges the reality that the Chief Immigration Judge may occasionally be "called upon" to "perform[] the duties" of an Immigration Judge by workload and other considerations.

[5] We note that the Board of Immigration Appeals and the United States Court of Appeals for the Sixth Circuit have both affirmed a decision in which the Chief Immigration Judge performed the duties of an Immigration Judge. *Matter of Ferdinand Hammer*, File A08-865-516 (BIA Oct. 13, 1998), *aff'd, Hammer v. INS*, 195 F.3d 836 (6th Cir. 1999), *cert. denied*, 528 U.S. 1191 (2000).

because two of the three cases he heard over a period of many years dealt with this issue, the Chief Immigration Judge's decision to appoint himself to hear this case raises serious concerns about his impartiality.

In a 1998 law review article, the Chief Immigration Judge addressed the treatment of Nazi war criminals under United States immigration law. *See* Michael J. Creppy, *Nazi War Criminals in Immigration Law*, 12 Geo. Immigr. L.J. 443 (1998). The article attempts, by its own terms, to be a "comprehensive presentation" on the law relating to the removal of persons who assisted in Nazi persecution. The first ten pages are devoted to "historical development" of the law in this area. In this section of the article the Chief Immigration Judge noted that "it is believed that a high number of suspected Nazi War Criminals illegally entered the United States under" the Displaced Persons Act of 1948. *Id.* at 447. The DPA is the provision of law under which the respondent entered this country in 1951.

The next fourteen pages of the law review article discuss the investigation, apprehension, and attempted removal of persons who allegedly assisted in Nazi persecution, including a detailed and objective discussion of the removal process. *Id.* at 453-67. The final three paragraphs – less than one published page in the article – discuss the Chief Immigration Judge's opinions "on the future of this area of immigration law." Those paragraphs read, in their entirety:

> A. Time Issue
>
> The issue of Nazi War Criminals in immigration law will eventually subside. This is not because of a lack of interest, rather it is a reflection of the challenge we face every day – the passage of time. It has been nearly 52 years since World War II ended. If a person had been 18 years old at the time the war ended, he would be 70 years old today. This "biological solution" as it has been called, effects [sic] not just the ability to find the Nazi War Criminals alive and in sufficient health to stand trial, but also it challenges the government's ability to find witnesses to testify to the atrocities. It is a simple fact that time will resolve the problem.
>
> B. A Change in Scope or Focus
>
> Where will this leave this area of immigration law? The author believes the focus of the government efforts will or should turn to targeting the removal of other war crime criminals believed to have committed similar atrocities. For example, in the last few years we have seen the devastation that has occurred in areas such as Bosnia, Somalia, Rwanda and Liberia.
>
> The IMMACT 90 included a revision to our immigration laws, in section 212(a)(2)(E)(ii), which mandates that aliens who have committed genocide not be admitted into the United States. Regrettably, it is quite possible that some of the perpetrators of these crimes against humanity have reached or may reach safe harbor within U.S. borders. With the

> emphasis on removing Nazi war criminals diminishing as a natural effect of time, the government may seek to renew its efforts by ferreting this new crop of war criminals. It is a sad testimony to humanity that as a society we continue to generate war criminals. As long as we persist in taking action against them, we continue to triumph over them.

Id. at 467.

The respondent argues that the Chief Immigration Judge's personal views on the need for aggressive prosecution of suspected Nazi war criminals under U.S. immigration law betrays an improper bias. Respondent's Br. at 18. Specifically, the respondent argues that "the Chief Immigration Judge's opinion that those suspected of having committed war crimes and 'similar atrocities' should be 'targeted for removal,' reveals a lack of impartiality towards aliens – such as the respondent – who have been placed in removal proceedings and charged with participation in Nazi persecution or genocide under the INA." Respondent's Br. at 18. We disagree.

The standard for recusal of an Immigration Judge is whether "it would appear to a reasonable person, knowing all the relevant facts, that the judge's impartiality might reasonably be questioned." Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum 05-02: *Procedures For Issuing Recusal Orders in Immigration Proceedings* ("Recusal Memo"), published in 82 Interp. Rel. 535 (Mar. 28, 2005). The Board has declared that recusal is warranted where: 1) an alien demonstrates that he was denied a constitutionally fair proceeding; 2) the Immigration Judge has a personal bias stemming from an extrajudicial source; or 3) the Immigration Judge's conduct demonstrates "pervasive bias and prejudice." *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982).

In total, the respondent's claims of bias are premised on fewer than a half dozen sentences in a 25-page article. We note that the Chief Immigration Judge did not make any comment that would appear to commit him to a particular course of action or outcome in this or any other case. In fact, he did not specifically mention the respondent and he made no statement indicating any personal bias or animosity toward the respondent or any other identifiable individual. Instead, he emphasized that the respondents in Holtzman Amendment cases are entitled to due process protections such as an evidentiary hearing and both administrative and judicial review, and that the government has the burden of proving its allegations by clear and convincing evidence. *See* 12 Geo. Immigr. L. J. at 464.

We find that the Chief Immigration Judge's law review article expressed nothing more than a bias in favor of upholding the law as enacted by Congress, which is not a sufficient basis for recusal. *See Buell v. Mitchell*, 274 F.3d 337, 345 (6th Cir. 2001) (noting that "[i]t is well-established that a judge's expressed intention to uphold the law, or to impose severe punishment within the limits of the law upon those found guilty of a particular offense," is not a sufficient basis for recusal); *United States v. Cooley*, 1 F.3d 985, 993 n.4 (10th Cir. 1993) ("Judges take an oath to uphold the law; they are expected to disfavor its violation."); *Smith v. Danyo*, 585 F.2d 83, 87 (3rd Cir. 1978) (noting that "there is a world of difference between a charge of bias against a party . . . and a bias in favor of a particular legal principle"); *Baskin v. Brown*, 174 F.2d 391, 394 (4th Cir. 1949) ("A judge cannot be disqualified merely

because he believes in upholding the law, even though he says so with vehemence."). Moreover, we find no instances of a federal judge having been recused under circumstances similar to this case, i.e., where he or she made general statements about an area of law. *Compare, e.g., United States v. Cooley*, *supra*, at 995 (recusal required where judge appeared on "Nightline" and expressed strong views about a pending case); *United States v. Microsoft Corp.*, 253 F.3d 34, 109-15 (D.C. Cir. 2001) (district court judge created an appearance of impropriety by making "crude" comments to the press about Bill Gates and other Microsoft officials); *Roberts v. Bailar*, 625 F.2d 125, 127-30 (6th Cir. 1980) (disqualification required in employment discrimination suit against post office, where judge stated during a pre-trial hearing: "I know [the Postmaster] and he is an honorable man and I know he would never intentionally discriminate against anybody.").

We also note that the standard for recusal can only be met by a showing of actual bias. *See Harlin v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir. 1998) (administrative judge enjoys "a presumption of honesty and integrity" which may be rebutted only by a showing of actual bias); *Del Vecchio v. Illinois Dep't of Corr.*, 31 F.3d 1363, 1371-73 (7th Cir. 1994) (en banc) (absent a financial interest or other clear motive for bias, "bad appearances alone" do not require disqualification of a judge on due process grounds). Nothing in the Chief Immigration Judge's decisions or the record establishes that the Chief Immigration Judge was actually biased against the respondent, nor does the respondent point to any error in the decisions which allegedly resulted from bias.

We also reject the respondent's argument regarding the alleged appearance of impropriety based on the fact that although the Chief Immigration Judge presided over only three removal cases from 1996 to 2006, two of those cases involved aliens who allegedly assisted in Nazi persecution. The respondent argues that the Chief Immigration Judge has "exhibited an unmistakable interest" in Holtzman Amendment cases by writing a law review article about such cases and presiding over such cases during a ten-year period when he heard a total of three cases. Respondent's Br. at 19-20. The respondent speculates that this interest shows "a decided lack of judicial impartiality, if not outright bias," and that by presiding over this case the Chief Immigration Judge is attempting to "dictate" the outcome of this proceeding. Respondent's Br. at 20, 23. We disagree.

A judge is not precluded from taking a special interest in a certain area of law, and the fact that a judge has done so does not imply that the judge cannot fairly adjudicate such cases. *See e.g., United States v. Thompson*, 483 F.2d 527, 529 (3rd Cir. 1973) (bias in favor of a legal principle does not necessarily indicate bias against a party). Moreover, federal courts have recognized that a departure from random assignment of judges, including the assignment of a case to the Chief Judge, is permissible when a case is expected to be protracted and presents issues that are complex or of great public interest. For example, in *Matter of Charge of Judicial Misconduct or Disability*, 196 F.3d 1285, 1289 (D.C. Cir. 1999), the D.C. Circuit upheld a local rule permitting the Chief Judge to depart from the random assignment of cases if he concluded that the case will be protracted and a non-random assignment was necessary for the "expeditious and efficient disposition of the court's business." The appeals court further recognized that it was permissible for the Chief Judge to assign such cases to judges who were "known to be efficient" and who had sufficient time in their dockets to "permit the intense preparation required by these high profile cases." Id. at 1290.

We note that Holtzman Amendment cases are generally complicated and require preparation of lengthy written decisions. In contrast, most decisions by Immigration Judges in removal proceedings are decided in an oral opinion issued from the bench immediately after the evidence has been presented.[6] The Chief Immigration Judge had previously presided over a Holtzman Amendment case, had published an article in that area of law, and was not burdened with an overcrowded docket. For these reasons, we find that it was reasonable for the Chief Immigration Judge to assign the case to himself, i.e., he had the time necessary to conduct this case and the expertise needed to handle it in a fair, impartial, and efficient manner. Thus, we conclude that an objectively reasonable person would not regard the Chief Immigration Judge's assignment of this case to himself as a reason to question his impartiality. Rather, such a person would likely conclude that the assignment was both reasonable and justified.

After reviewing the record, we find that a reasonable person knowing all the facts of this case would not question the Chief Immigration Judge's impartiality. Moreover, the respondent has not shown that he was denied a constitutionally fair proceeding, that the Immigration Judge had a personal bias against him stemming from an extrajudicial source, or that the Chief Immigration Judge's conduct demonstrated a pervasive bias and prejudice against him. For all of these reasons, we conclude that the Chief Immigration Judge was not required to recuse himself from the respondent's removal proceedings.

C. Assignment of the Respondent's Case on a Random Basis

The respondent argues that the Chief Immigration Judge should have assigned the respondent's case to an Arlington Immigration Judge on a random basis. Specifically, citing to 8 C.F.R. § 1003.10, the respondent argues that by singling out the respondent's case and imposing himself as arbiter of his removal proceedings, rather than allowing the case to be assigned to an Immigration Judge on a random basis according to the method routinely employed by the Arlington Immigration Court, he sidestepped the proper regulatory procedures. The respondent asserts that the Chief Immigration Judge's actions raise such serious due process concerns that the respondent was deprived of a fair hearing.

In support of his argument, the respondent points to cases which note that one tool to help ensure fairness and impartiality in judicial proceedings is the assignment of cases to available judges on a random basis. *See Beatty v. Chesapeake Ctr., Inc.*, 835 F.2d 71, 75 n.1 (4th Cir. 1987) (Murnaghan, C.J., concurring) ("One of the court's techniques for promoting justice is randomly to select panel members to hear cases."). However, the respondent has pointed to no statute, regulation, or case law which affirmatively requires the random assignment of an Immigration Judge in removal proceedings, or which strips the Chief Immigration Judge of the authority to assign a specific case. Indeed, at least one federal court has expressly concluded that random assignment is not required to satisfy the standard of impartiality, stating that "[a]lthough random assignment is an important innovation in the judiciary, facilitated greatly by the presence of computers, it is not a necessary component to a judge's impartiality. *Obert v. Republic W. Ins.*, 190 F.Supp.2d 279, 290-91 (D.R.I. 2002). Moreover, the respondent himself acknowledges that random assignment is not "mandatory, but that it is appropriate given the history and circumstances of this unique case." Respondent's Br. at 25. As discussed above, the Chief Immigration Judge had previously presided over a Holtzman Amendment case, had published an article in that area of

[6] The Chief Immigration Judge issued three separate written decisions in this case.

law, and was not burdened with an overcrowded docket. For these reasons, and because there is no authority mandating the random assignment of the respondent's removal proceedings, we reject the respondent's argument on this point.

D. Establishing Facts Relating to Removability by Collateral Estoppel

The respondent next argues that the Chief Immigration Judge improperly applied the doctrine of collateral estoppel. In his June 16, 2005, decision, the Chief Immigration Judge applied collateral estoppel with respect to all but one of the allegations in the NTA. The respondent argues that collateral estoppel cannot be applied to the present case because the respondent did not have a full and fair opportunity to litigate the issues on which the Chief Immigration Judge granted the government's collateral estoppel motion. We disagree.

The doctrine of collateral estoppel, or issue preclusion, provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Hammer v. INS*, 195 F.3d 836, 840 (6th Cir. 1999), *quoting Montana v. United States*, 440 U.S. 147, 153 (1979). In a case involving the Board of Immigration Appeals, the United States Court of Appeals for the Sixth Circuit decided that the doctrine of collateral estoppel applies only when 1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation; 2) the issue was actually litigated and decided in the prior action; 3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation; 4) the party to be estopped was a party to the prior litigation (or in privity with such a party); and 5) the party to be estopped had a full and fair opportunity to litigate the issue. *Id.* at 840 (citations omitted); *see also Matter of Fedorenko*, 19 I&N Dec. 57, 67 (BIA 1984) (holding that an alien's prior denaturalization proceedings conclusively established the "ultimate facts" of a subsequent deportation proceeding, so long as the issues in the prior suit and the deportation proceeding arose from "virtually identical facts" and there had been "no change in the controlling law.").

1. The Respondent's Collateral Estoppel Argument Regarding the Trawniki Card

The respondent's first collateral estoppel argument centers around the signature on the German *Dienstausweis*, or Service Identity Card, identifying the holder as guard number 1393 at the Trawniki Training Camp. The Trawniki card also identifies the holder by name, date of birth, and other information, and contains a signature in the Cyrillic alphabet that transliterates to "Demyanyuk." Exh. 5B, FOF 2-19.

In each trial the respondent argued, unsuccessfully, that the Trawniki card did not refer to him. In 1987 the respondent faced a criminal trial in Israel. During that trial, the respondent offered the testimony of Dr. Julius Grant, a forensic document examiner who claimed that the signature on the Trawniki card was not made by the respondent. In response, the Israeli government elicited testimony from Dr. Gideon Epstein, the retired head of the Forensic Document Laboratory at the former Immigration and Naturalization Service. In his testimony, Dr. Epstein rejected Dr. Grant's conclusions regarding the signature on the Trawniki card, pointing out specific flaws in his testimony. See Exh. 17M. The respondent's attorney cross-examined Dr. Epstein, but did not question him about his critique of Dr. Grant's testimony. The Israeli court rejected Dr. Grant's conclusions regarding the Trawniki card. Exh. 17G at 95-96.

In rejecting the respondent's claim that he was not the person named on the Trawniki card, the denaturalization court found that Dr. Grant's testimony in Israel was "not reliable or credible" and cited a portion of Dr. Epstein's testimony. Exh. 5B, FOF 22. The respondent subsequently filed a series of post-trial motions and an initial brief in support of his appeal to the United States Court of Appeals for the Sixth Circuit, none of which mention his present allegation that Dr. Epstein testified falsely and that the district court improperly relied on the testimony of Dr. Epstein in disregarding Dr. Grant's testimony.

The respondent first raised the issue of Dr. Epstein's allegedly false testimony in a reply brief filed during the pendency of his appeal to the United States Court of Appeals for the Sixth Circuit. Respondent's Br. at 30. The Sixth Circuit refused to consider the issue and granted the government's motion to strike his reply brief on the ground that issues raised for the first time on appeal are beyond the scope of the court's review. *See* 367 F.3d at 638. The Sixth Circuit also commented on the lack of evidence or legal support offered with respect to the respondent's arguments regarding Dr. Epstein's testimony. Specifically, the Court noted that the respondent "cannot raise allegations in the eleventh hour, without evidentiary or legal support, as '"issues adverted to [on appeal] in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived . . . ."' *Demjanjuk* 367, F.3d at 638 (citations omitted).

We reject the respondent's argument that he did not have a fair opportunity to litigate his claims regarding the Trawniki card. The respondent knew (or should have known) all pertinent facts at the completion of Dr. Epstein's direct examination. However, he did not raise any objection concerning Dr. Epstein's testimony during cross-examination, nor did he object to this testimony in his first post-trial motions. Even when the respondent appealed his case to the United States Court of Appeals for the Sixth Circuit he failed to question the testimony of Dr. Epstein in his initial brief. It was only in a reply brief that he finally raised this issue. At that late point in the proceedings, and given what the Sixth Circuit found to be a dearth of evidentiary or legal support, the Court found that the respondent had waived his opportunity to raise a new argument and granted the government's motion to strike his brief.

Collateral estoppel requires only that a party had a full and fair *opportunity* to litigate relevant issues during the earlier proceeding. A litigant cannot avoid collateral estoppel if, solely through the litigant's own fault, an issue was not raised or evidence was not presented. *See generally, N. Georgia Elec. Membership Corp.*, 989 F.2d 429, 438 (11th Cir. 1993); *Blonder-Tongue Laboratories*, 402 U.S. 313, 333 (1971) (collateral estoppel does not apply if the litigant, through no fault of his own, is deprived of crucial evidence or witnesses). In the present case, the respondent was not prevented from raising his concerns about Dr. Epstein during the denaturalization case—rather, he simply failed to do so until it was too late. *See Demjanjuk* 367, F.3d at 638 (citations omitted); *see also United States v. Crozier*, 259 F.3d 503, at 517 (6th Cir. 2001) (citations omitted) (noting that the Sixth Circuit generally will not hear issues raised for the first time in a reply brief). Because the respondent had a fair opportunity to litigate his claims about Dr. Epstein's testimony but did not do so, he waived those claims in the denaturalization case and is barred from raising them here.

2. The Respondent's Collateral Estoppel Argument Regarding Certain Documents

The respondent's second collateral estoppel argument centers around the difficulty he experienced obtaining certain documents in his denaturalization proceedings. He argues that the government's case against him was founded on documents, most of which had been supplied to the government by the former Soviet Union or by states formed from the former Soviet Union, and that his ability to obtain other documents from the files from which the government's documents came was limited or non-existent. He argues that he relied on the U.S. Government to help him retrieve documents held by the government of Ukraine, and the failure of the U.S. government to aggressively pursue these documents "effectively denied [him] a fair opportunity to litigate his case." Respondent's Br. at 36. We disagree.

The respondent first learned of the existence of a KGB investigative file that contained materials pertaining to him, i.e., Operational Search File No. 1627 ("File 1627"), in May of 2001. On May 14, 2001, the respondent filed an emergency motion for continuance of the trial date in which he alleged "discovery abuse" by the government. Exh. 5G, docket entry 109. Two days later, he filed a supplemental brief in support of that motion, in which he raised issues about the contents of File 1627. Id. docket entry 110.

On May 21, 2001, the respondent filed a second emergency motion seeking to conduct additional discovery relating to File 1627. Exh. 5G, docket entry 112; NOA Attachment D. The respondent sought to depose both U.S. and Ukranian officials, and to obtain the contents of any investigative files in the possession of Ukranian authorities relating to the respondent or his cousin, Ivan Andreevich Demjanjuk, "if necessary with the assistance of the United States government." NOA Attachment D. On May 22, 2001, the district court denied the respondent's motion to continue the trial date, but granted his motion for discovery in part and permitted him to seek the investigative files. NOA Attachment E.

Two days later, at the respondent's request, the Director of the Justice Department's Office of Special Investigations ("OSI") sent a letter to Ukranian authorities making what he termed a "very urgent request" for "copies of the complete contents" of File 1627. NOA Attachment F. The letter requested that Ukranian authorities advise OSI "tomorrow" as to whether File 1627 had been found and was being copied, and when the copies could be expected at the U.S. Embassy in Kiev. *Id.* The letter notes that the Director of OSI telephoned the Ukranian Embassy in Washington and personally discussed the matter with Ukranian officials shortly before the letter was faxed to the embassy. *Id.*

Despite the urgent nature of OSI's request, the Ukranian Government did not respond for more than 2 months. In a letter dated July 27, 2001, a Ukranian official informed the U.S. government that "[i]n the Directorate of the Security Service in Vinnytsya Oblast there is in fact an Operational Search File No. 1627, which deals with the course of the investigative work pertaining to I.M. Demyahyuk." NOA Attachment G. The letter made no reference to the availability of copies or other access to the contents of the file. Instead, the letter indicated that some 585 pages of material had been sent to Moscow in 1979. *Id.* The U.S. government submitted a copy of this letter to the respondent and to the court, together with a complete English translation and a cover letter on August 17, 2001 – after the trial but some 6 months before the district court rendered a judgment against the respondent. *Id.* There is no evidence that the

respondent thereafter attempted to obtain copies of this material or that he sought to have the U.S. government assist in obtaining such copies.

On February 21, 2002, 6 months after the respondent received a copy of the July 27, 2001, letter from a Ukranian official, the district court entered a judgment revoking the respondent's naturalized U.S. citizenship. On March 1, 2002, the respondent filed a comprehensive post-judgment motion asking the court to amend its findings, alter or amend the judgment, grant a new trial, and/or grant relief under Fed. R. Civ. P. 60(b). Exh. 5G, docket entry 171. At that time, the respondent was fully aware of the U.S. government's efforts to obtain File 1627 and the Ukranian government's response, and he had no reason to believe that the government had made further efforts to obtain the file. In this motion the respondent did not raise the issue of the government's efforts to obtain File 1627.

The respondent filed an appeal from the denaturalization judgment with the United States Court of Appeals for the Sixth Circuit on May 10, 2002. Again, he did not raise any issue relating to File 1627 in either his initial brief or his reply brief. On February 12, 2003, the respondent filed a second post-judgment motion pursuant to Fed. R. Civ. P. 60(b), and again did not raise any issue with respect to File 1627. His motion was denied by the district court, and his appeal from that decision was dismissed. Exh. 17O.

The respondent's removal proceedings were commenced in December 2004. On February 25, 2005, the government moved to apply collateral estoppel to the findings and conclusions in the denaturalization case. The respondent did not raise any issue relating to File 1627 in his brief opposing the government's motion, and the Chief Immigration Judge granted the motion on June 16, 2005. Exh. 14.

While there is no provision for discovery in the course of removal proceedings, the Government voluntarily provided various documents on July 22, 2005, at the respondent's request. One such document was a May 31, 2001, e-mail from Evgeniy Suborov, an employee of the U.S. Embassy in Ukraine, to Dr. Steven Coe, a government staff historian. NOA Attachment I ("the Suborov e-mail"). The Suborov e-mail states that File 1627 contained a large number of pages (585 of which apparently had been sent to Moscow). Despite receiving the Suborov e-mail on July 22, 2005 – some 5 months before the Chief Immigration Judge entered his final order, the respondent did not request that the Chief Immigration Judge reconsider his decision granting collateral estoppel, nor did he raise any issue relating to File 1627 before the Chief Immigration Judge in any other context. On January 23, 2006, the respondent filed a Notice of Appeal with the Board, in which he raised his claims regarding File 1627 for the first time in the course of his removal proceedings.

It is well-established that appellate bodies ordinarily will not consider issues that are raised for the first time on appeal. *E.g., Am. Trim L.L.C. v. Oracle Corp.*, 383 F.3d 462, 477 (6th Cir. 2004) (citations omitted) (noting that the appeals court would not consider an argument raised for the first time in a reply brief). Consistent with regulatory limits on the Board's appellate jurisdiction, the Board has applied this rule to legal arguments that were not raised before the Immigration Judge. *Matter of Rocha*, 20 I&N Dec. 944, 948 (BIA 1995) (citations omitted) (INS waived issue by failing to make timely objection). *See also* 8 C.F.R. § 1003.1(b)(3) (Board's appellate jurisdiction in removal cases is limited to review of decisions by an Immigration Judge). In addition, the Board "will not engage in fact finding in the course of deciding

appeals," 8 C.F.R. § 1003.1(d)(iv), and a party may not "supplement" the record on appeal. *Matter of Fedorenko*, *supra* at 73-74.

Despite having a full and fair opportunity to pursue his concerns regarding File 1627 during his denaturalization proceedings, the respondent elected not to raise any issues relating to File 1627 in his first post-trial motion, his direct appeal, and his subsequent motion for relief from judgment. Moreover, although the respondent filed numerous pleadings with the Chief Immigration Judge and appeared before him on two occasions, he never: 1) mentioned File 1627; 2) made his own efforts to examine or obtain a copy of the file; or 3) claimed that collateral estoppel should be denied for reasons relating to the file. For these reasons, we find no error in the Chief Immigration Judge's decision to apply collateral estoppel in this case, and we reject the respondent's argument that he was denied a fair opportunity to litigate his case. Because he did have the opportunity to raise his claims regarding File 1627 below, we conclude that those claims have been waived and we will not consider them now for the first time on appeal.

We reject the respondent's claim that he could not have raised the issue of File 1627 earlier and that "new information" came to light after the Chief Immigration Judge granted the government's motion for collateral estoppel in June 2005. As of August 17, 2001, the respondent was aware that File 1627 contained a large number of pages, only a few of which had been provided to the U.S. Government. He was also fully aware of the U.S. Government's written and telephonic efforts to obtain a complete copy of the file for him and the Ukranian government's response. Therefore, the documents the respondent seeks to rely on as "new information" (Respondent's Br. tabs J, K and L) simply confirm what the respondent knew or should have known long before his citizenship was revoked and the removal case began. For all of these reasons, we agree with the Chief Immigration Judge's conclusion that the facts established in the denaturalization case are conclusively established in his removal proceedings (thereby rendering the respondent removable as charged) by operation of the doctrine of collateral estoppel.

E. Deferral of Removal under the Convention Against Torture

Finally, the respondent argues that the Chief Immigration Judge erred in denying his application for deferral of removal under the Convention Against Torture. A person seeking deferral of removal must prove that it is more likely than not that he or she would be tortured if removed to a particular country. 8 C.F.R. §§ 208.16(c)(2) and 208.17(a). It is not sufficient for an applicant to claim a subjective fear of torture, rather, the applicant must prove, through objective evidence, that he or she is likely to be tortured in a particular country. *Matter of J-E-*, 23 I&N Dec. 291, 302 (BIA 2002). For purposes of the Convention Against Torture, "torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for a specific purpose, such as extracting a confession or punishing the victim. 8 C.F.R. § 208.18(a)(1). To qualify as torture, the act must also be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," at a time when the victim is in the offender's "custody or physical control." 8 C.F.R. §§ 208.18(a)(1) and (6). "Torture is an extreme form of cruel and inhumane treatment and does not include lesser forms of cruel, inhumane, or degrading treatment or punishment...." 8 C.F.R. § 208.18(a)(2). Moreover, "[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture." 8 C.F.R. § 208.18(a)(5).

The thrust of the respondent's claim for deferral is that: 1) the United States Government created a widespread public perception that he is responsible for crimes committed against Jewish prisoners by "Ivan the Terrible" at the Treblinka death camp; 2) the United States will encourage Ukraine to arrest, detain, and prosecute him if he is removed to Ukraine; 3) it is "irrational" to believe that the Ukrainian government will not comply with such requests; 4) many prisoners in Ukraine are subjected to mistreatment and/or torture; and 5) the respondent is especially "vulnerable" to mistreatment and torture because of his age. In denying the respondent's application, the Chief Immigration Judge concluded that the respondent failed to prove three key facts: 1) that as a result of the government's previous assertion that he was "Ivan the Terrible" (an assertion that the government has not made in more than a decade), he is likely to be prosecuted if removed to Ukraine; 2) that if prosecuted, he is likely to be detained; and 3) that if prosecuted and detained, he is likely to be tortured.

The Chief Immigration Judge relied on numerous exhibits showing that Ukraine has not charged, indicted, prosecuted, or convicted a single person for war crimes committed in association with the Nazi government of Germany, despite having numerous opportunities to do so. CIJ Deferral Dec. at 10 (citing Exhibits 35 at 1-2, 36, 37A at 15-22, 37C, 37G, 37H). Moreover, we note that the respondent stipulated that several Ukranian nationals who assisted in Nazi persecution had not been indicted or prosecuted, nor had Ukraine requested their extradition, despite the U.S. government's efforts to encourage Ukraine to do so. Exh. 35 §§ 1-20. We reject the respondent's speculation that because of his notoriety, his case is markedly different from others who have been returned to Ukraine. Instead, the State Department's advisory opinion letter[7] rebuts this claim by expressing the opposite opinion: that the government of Ukraine is "very unlikely" to mistreat a "high-profile individual[]" such as the respondent. Exhs. 39A and 45. For these reasons, and given the absence of *any* evidence of a Nazi war criminal facing prosecution in Ukraine, the respondent's speculative argument is not persuasive. Therefore, we agree with the Chief Immigration Judge that the respondent failed to establish that he is likely to be prosecuted if removed to Ukraine.

We also agree with the Chief Immigration Judge's finding that the respondent has not established that he is likely to be detained even in the unlikely event that he is prosecuted in Ukraine. As set forth in the stipulations between the parties, Ukranian law allows for pre-trial release of criminal defendants, and large numbers of Ukranian criminal defendants are released from custody while awaiting trial. CIJ Deferral Dec. at 11 (citing Exh. 35).

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[7] We reject the respondent's argument that the State Department's advisory opinion is inadmissible. In this regard, we note that the Federal Rules of Evidence do not apply in immigration court proceedings. Because the letter from the State Department is probative and its use is not unfair to the respondent, we find no error in the Chief Immigration Judge's consideration of the letter. *See Matter of K-S-*, 20 I&N Dec. 715, 722 (BIA 1993) (relying on State department advisory opinion letter as "expert" evidence); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999) (noting that the test for admissibility of evidence is whether the evidence is probative and whether its use is fundamentally fair so as to not deprive the alien of due process); 8 C.F.R. §§ 1208.11(a) and (b) (the State Department may provide an assessment of the accuracy of an applicant's claims, information about the treatment of similarly-situated persons or "[s]uch other information as it deems relevant").

Finally, we agree with the Chief Immigration Judge's finding that although conditions in Ukranian prisons may be harsh, it is unlikely that the respondent would be tortured if detained. In this context we note that the evidence of record indicates that the government of Ukraine has permitted international monitoring of its prisons and has engaged in improvement efforts. CIJ Deferral Dec. at 12 (citing Exhs. 39A and 45). Moreover, we note that even if the respondent were to face harsh prison conditions in the unlikely event that he faces detention, generally harsh prison conditions do not constitute torture. *See Matter of J-E-*, 23 I&N Dec. at 301-04; *see generally, Alemu v. Gonzales*, 403 F.3d 572, 576 (8th Cir. 2005) (noting that substandard prison conditions are not a basis for relief under the Convention Against Torture unless they are intentionally and deliberately created and maintained in order to inflict torture); *Auguste v. Ridge*, 395 F.3d 123, 152-53 (3rd Cir. 2005).

Based on our review of the evidence of record, we conclude that the findings of the Chief Immigration Judge are reasonable and permissible conclusions to draw from the record and that none of the findings is clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). Simply put, the respondent's arguments regarding the likelihood of torture are speculative and not based on evidence in the record. *See Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006) (applicant fails to carry burden of proof if evidence is speculative or inconclusive). Therefore, we reject the respondent's arguments, and conclude that the Chief Immigration Judge correctly decided that the respondent failed to prove that he is likely to be prosecuted in Ukraine; that if prosecuted, he is likely to be detained either prior to trial or as a result of a conviction; and, that if prosecuted and detained, he is more likely than not to be tortured.

IV. CONCLUSION

After reviewing the record, we find no error in the Chief Immigration Judge's three decisions from which the respondent appeals. We conclude that the Chief Immigration Judge correctly found that the respondent is removable as charged and ineligible for any form of relief from removal. Moreover, we reject the arguments raised by the respondent on appeal. For these reasons, the following order shall be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

ATTACHMENT NO. 2

MEDICAL REPORTS

CLEVELAND CLINIC CANCER CENTER
AT PARMA COMMUNITY GENERAL HOSPITAL
8525 Powers Blvd., Parma, OH 44129
Ph: 440-743-4747 Fax: 440-743-4715

NAME: DEMJANJUK, John
CLINIC NO: 48848207
DATE OF SERVICE: 07/16/2008

DIAGNOSIS:
1. Myelodysplastic syndrome
2. Persistent anemia secondary to above

John Demjanjuk returned to clinic for follow up with his wife. He stated he is still weak despite receiving 2 units of blood transfusion around a month ago. He has received 2 doses of Procrit injection (every 2 weeks) since last visit. Symptom wise, he does not feel much different. He denies any fever, chills, night sweats or weight loss. His main complaint is weakness and his knee bothers him. His knee problem is pre-existing. He denies any chest pain, shortness of breath at rest or palpitations. No GI or GU complaints. No bleeding at all. No easy bruising.

His past medical history, personal/social history, medications and allergies were all reviewed.

REVIEW OF SYSTEMS: All 10 systems were reviewed. Except what is described above, the rest of the review of systems was completely unremarkable.

PHYSICAL EXAM: GENERAL: Patient appears at his baseline, comfortable, not in distress. He is afebrile with temperature 96, pulse 64, respiratory rate 20, blood pressure 122/64, weight 225 pounds. HEENT: Pale, no jaundice. Normal oropharynx on visual exam. RESPIRATORY SYSTEM: Lungs clear to auscultation bilaterally. No wheezing, rhonchi or crackles. Chest movement symmetrical. Trachea midline. CARDIOVASCULAR SYSTEM: Heart sounds S1, S2 with regular rate and rhythm. No gallops or additional heart sounds. GASTROINTESTINAL SYSTEM: Abdomen is soft, obese and nontender, nondistended. Normal active bowel sounds. No palpable mass or hepatosplenomegaly. MUSCULOSKELETAL SYSTEM: Decreased range of motion in major joints, symmetrical. No asymmetrical muscle weakness. Trace edema in lower extremities.

LABORATORY TESTS: WBC 2.4, hemoglobin 9.5, hematocrit 28.3, platelet count 210,000. Creatinine 1.8, BUN 36, total bilirubin 0.6.

ASSESSMENT/PLAN:
1. Myelodysplasia, responding poorly to Procrit therapy, although he only received 2 doses so far. I will continue the treatment and increase frequency of Procrit injection to every week if possible.
2. Chronic renal failure. I will refer him to nephrologist for nephrology consultation.
3. I advised the patient and his wife to bring his son with him during the next visit in one month. I will discuss chemotherapy with hypermethylating agent with them. Patient does not really understand much English, therefore, I feel that the language barrier is really affecting his informed decision-making ability. He will probably benefit from hypermethylating agent like Vidaza or Dacogen, if he could tolerate. We will discuss more in detail next time.
4. Given his symptomatic anemia, I offered the patient another 2 units of blood transfusion. He understood my recommendation, however, he could not make any decision when I asked him whether he would like to have a blood transfusion, his answer was "I do not know". This is quite frustrating. I advised him and his wife to go home and talk to his son and if he changes his mind on blood transfusion he will call and let me know. I will be happy to schedule it for him.

Total counseling time was about 40 minutes. This apparently is a difficult patient to take care of.

Wei Lin, M.D.

cc:
Date Dictated: 07/16/2008

Date Typed: jlb 07/17/2008 09:00

03/18/2009 10:57 FAX 440 88 828 KEUCK CHANG MD 001/001

OFFICE HOURS BY APPOINTMENT

KEUCK CHANG, M.D.
DIPLOMATE IN NEPHROLOGY

6789 RIDGE RD., SUITE 203
PARMA, OHIO 44129

TEL: 440-888-4426
FAX: 440-888-8033

NAME: Demjanjuk, John
Birth date:04/03/1920 Age: 88 Gender: Male

Emergency contact:
Privacy:family. Marital status/Occup:
Insurance: I
Chart No:8803a 8/08 217 160-170/70 Prob:

DATE: 09/08/2008 WT 227 BP 152/70 HT (6'0). TEMP
consult office visit with lab, us renal
99214
Follow up with Dr. Goliat for primary care
Follow up with Dr. Lin

x 72 inches / 3131
Body Surface 2.284
72.1 ml/min → 54.6 ml/hr/1.73

Entitled for Social security → Medicare refused to pay for [illegible]
→ Had Ford Co. to assume primary provider HMO health [illegible]
received [illegible] 401Ks ago

130/60 both arms.
JVD ⊖
Heart lungs Clear.
abd. soft, Kidney liver not palpable
[illegible] ⊖

1. CKD. (Stage 3.) 54.6 ml/min/1.73.
2. Hyperoxaluria
return date: Hyperoxaluria..
signature:
3. Anemia ← MDS / CKD.
4. Kidney stones. Hyperoxaluria? (Tums) ↑ calcium / Renal [illegible] / 4(m)

1. To call result of Vit D level
2. Tums one c each meal

Wife answered
9/9 Talked to pt
Vit D 400 IU/d

1-12-09. 4:30

TIMMAPPA P. BIDARI, MD., INC.

JANUARY 19, 2009

DEMJANJUK, JOHN

DIAGNOSIS:
1. Myelodysplastic syndrome.
2. Anemia and leukopenia secondary to above.
3. Acute gout in the right big toe and the mid foot.

HISTORY OF PRESENT ILLNESS: He says he was coming along okay he started having severe pain in the right big toe and the middle of the foot since yesterday he has taken Colchicine but has run out of the medication.

REVIEW OF THE SYSTEMS:
Musculoskeletal System: As above.
General and Constitutional Symptoms: Has moderate degree of fatigue, denies fever and chills, night sweats, or weight loss.
Cardiovascular System: Has shortness of breath on exertion, no leg edema, or chest pain.
Head: Denies pressure or pain.
Eyes: Denies blurred vision.
ENT and Respiratory System: Unremarkable.
Skin: Denies rash, itching, or easy bruising. He has redness of the skin over the right big toe due to gout.
GI System: Denies abdominal pain, nausea, or vomiting.
Hemic and Lymphatic System: Has not felt any lumps under the arms, in the neck, or groins.
GU System: No dysuria or burning micturition has urinary frequency.
CNS: Has occasional lightheadedness.

SOCIAL HISTORY: As recorded previously.

PAST HISTORY: As recorded previously.

FAMILY HISTORY: As recorded previously.

PHYSICAL EXAM: Today reveals a B/P of 140/60; pulse rate is 72, respirations 18, temperature normal. Weight. 218 pounds. Head. Normal. Eyes. Conjunctival pallor noted no jaundice. ENT: Unremarkable. Neck. No lymphadenopathy. Chest. No sternal tenderness. Heart: Sounds normal. Lungs: Clear. Abdomen: No tenderness, no distention. Extremities: No leg edema, redness of the skin noted over the dorsum of the right big toe.

LABORATORY DATA: Today CBC shows hemoglobin of 9.8, hematocrit 29.2, WBC 3,100, and platelets 277,000.

TREATMENT PLANS: Give Procrit 60,000 units subcutaneously today.

I have prescribed him Colchicine 0.6 mg to take 1 daily for gouty arthritis in the right big toe and the foot.

Continue weekly Procrit and CBC, re-exam in two week's time.

TIMMAPPA P. BIDARI
TPB/djk

FROM :DR T BIDARI440-887-9572 FAX NO. :4408879572 Apr. 06 2009 04:46PM P2

TIMMAPPA P. BIDARI, M.D., INC.
PHOENIX MEDICAL CENTRE
6080 RIDGE RD., SUITE 304
PARMA, OH 44129
TELEPHONE: (440) 887-9570

DIPLOMATE AMERICAN BOARD OF
INTERNAL MEDICINE
DIPLOMATE IN THE SUBSPECIALITY OF
1. ONCOLOGY
2. HEMATOLOGY

4/6/09.

Ref: John Demjanjuk.

To Whom it may concern:

This 88 yr old Gentleman is under my care since 29th Sept 2008. He has established Diagnosis of Myelo Dysplastic Syndrome since oct 2004. Previously he was under care of different Hematologists and apparently one of them Dr. Liu had suggested possible chemotherapy He has received Procrit injections in the past. In my office he initially received 40,000 units once a wk, which was not effective in improving his Hemoglobin & Hematocrit. For the past few months he is getting PROCRIT inj 60,000 units once weekly. Family raised the issue of whether John needs chemotherapy. We briefly talked about it. I suggested a Bone marrow test and Chromosome studies before deciding about it.

Yours sincerely

Timmappa P. Bidari

GIUSEPPE ANTONELLI, M.D.
Rheumatology and Internal Medicine
6789 Ridge Rd., Suite 108
Parma, Ohio 44129
(440)743-7100
Fax (440)743-7101

April 6, 2009

RE: John Demjannuk
DOB: 4-3-20

To Whom It May Concern,

Mr. Demjannuk is under my care for severe spinal stenosis and arthritis with chronic back and leg pains which requires supervision and analgesics.

If you have any questions, please conctact my office.

Sincerely,

Giuseppe Antonelli, M.D.

ATTACHMENT NO. 3

DECLARATION OF JOHN DEMJANJUK, JR.

VIDEO CLIP

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
ARLINGTON, VIRGINIA

In the Matter of John Demjanjuk	File No. A 08 237 417
In removal proceedings	

DECLARATION OF JOHN DEMJANJUK, JR

My father, John Demjanjuk, the Respondent in this removal proceeding, was examined by a doctor from the Department of Homeland Security on Thursday April 2, 2009. I was present during that examination and videotaped the examination.

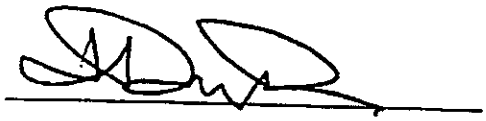
I have prepared a video clip of the concluding part of that examination, a copy of which I have given to my father's attorney. I prepared that video clip from the entire video recording of the examination. Representatives of the Immigration and Customs Enforcement Division of the Department of Homeland Security were present throughout the examination and throughout the videotaping.

The video clip is a true and exact copy of the last part of the medical examination. The entire video tape is available. I made a clip simply because the entire video tape file is very large, over 6,000 MB.

Declaration Pursuant to 28 USC 1746

I declare under penalty of perjury that the foregoing is true and correct.

Executed April 3, 2009



DEMJANJUK
MEDICAL
REVIEW

(VIDEO)
1

ATTACHMENT NO. 4

NEW I-589 APPLICATION FOR DEFERRAL OF REMOVAL UNDER CONVENTION AGAINST TORTURE

Department of Homeland Security
U.S. Citizenship and Immigration Services

U.S. Department of Justice
Executive Office for Immigration Review

OMB No. 1615-0067; Expires 12/31/07

I-589, Application for Asylum and for Withholding of Removal

START HERE - Please type or print in black ink. See the Instructions for information about eligibility and how to complete and file this application. There is NO filing fee for this application.

NOTE: Please check this box if you also want to apply for withholding of removal under the Convention Against Torture. ☒

Part A. I. Information about you.

1. Alien Registration Number(s) (A#s) *(If any)* 08237417			2. U.S. Social Security Number *(If any)* 303-36-5915
3. Complete Last Name Demjanjuk	4. First Name John	5. Middle Name None	
6. What other names have you used? *(Include maiden name and aliases.)* Iwan Demjanjuk			
7. Residence in the U.S. *(Where you physically reside.)*			Telephone Number (216) 524-3076
Street Number and Name 847 Meadowland Road			Apt. Number
City Seven Hills	State Ohio		Zip Code 44131
8. Mailing Address in the U.S. *(If different than the address in No. 7)* In Care Of *(If applicable)*: SAME			Telephone Number ( )
Street Number and Name			Apt. Number
City	State		Zip Code
9. Gender: ☒ Male ☐ Female	10. Marital Status: ☐ Single ☒ Married ☐ Divorced ☐ Widowed		
11. Date of Birth *(mm/dd/yyyy)* 04/03/1920	12. City and Country of Birth Dub Macharenzi, Ukrainian SSR		
13. Present Nationality *(Citizenship)* None	14. Nationality at Birth Soviet Citizen	15. Race, Ethnic or Tribal Group Ukrainian	16. Religion Orthodox

17. *Check the box, a through c, that applies:* a. ☐ I have never been in Immigration Court proceedings.
b. ☒ I am now in Immigration Court proceedings. c. ☐ I am not now in Immigration Court proceedings, but I have been in the past.

18. *Complete 18 a through c.*
a. When did you last leave your country? *(mmm/dd/yyyy)* ??/??/1942 b. What is your current I-94 Number, if any? N/A
c. Please list each entry into the U.S. beginning with your most recent entry.
List date (mm/dd/yyyy), place, and your status for each entry.(Attach additional sheets as needed.)

Date 9/22/1993 Place New York City Status Parolee Date Status Expires: N/A
Date 2/??/1952 Place New York City Status Immigration
Date _____ Place _____ Status _____

19. What country issued your last passport or travel document? United States	20. Passport # Travel Document #	21. Expiration Date *(mm/dd/yyyy)* Confiscated 7/2005
22. What is your native language? *(Include dialect, if applicable.)* Ukrainian	23. Are you fluent in English? ☐ Yes ☒ No	24. What other languages do you speak fluently? None

For EOIR use only.

For USCIS use only.
Action: Decision:
Interview Date: Approval Date:
Asylum Officer ID#: Denial Date:
Referral Date:

Part A. II. Information about your spouse and children

Your spouse. ☐ I am not married. (Skip to Your children, below.)

1. Alien Registration Number (A#) (If any)	2. Passport/ID Card No. (If any)	3. Date of Birth (mm/dd/yyyy)	4. U.S. Social Security No. (If any)
	012721894	08/09/1925	[redacted]

5. Complete Last Name	6. First Name	7. Middle Name	8. Maiden Name
Demjanjuk	Vera		Bulochnik

9. Date of Marriage (mm/dd/yyyy)	10. Place of Marriage	11. City and Country of Birth
09/1947	Germany	Ukrainian SSR

12. Nationality (Citizenship)	13. Race, Ethnic or Tribal Group	14. Gender
USA	Ukrainian	☐ Male ☒ Female

15. Is this person in the U.S. ?

☒ Yes *(Complete Blocks 16 to 24.)* ☐ No *(Specify location.)*

16. Place of last entry in the U.S.	17. Date of last entry in the U.S. (mm/dd/yyyy)	18. I-94 No. (If any)	19. Status when last admitted (Visa type, if any)
Cleveland	04/17/1989	n/a	USA Citizen

20. What is your spouse's current status?	21. What is the expiration date of his/her authorized stay, if any? (mm/dd/yyyy)	22. Is your spouse in Immigration Court proceedings?	23. If previously in the U.S., date of previous arrival (mm/dd/yyyy)
USA Citizen	n/a	☐ Yes ☒ No	n/a

24. If in the U.S., is your spouse to be included in this application? *(Check the appropriate box.)*

☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)*

☒ No

Your children. Please list all of your children, regardless of age, location or marital status.

☐ I do not have any children. ***(Skip to Part A. III., Information about your background.)***

☒ I have children. Total number of children: 3

(NOTE: *Use Supplement A Form I-589 or attach additional sheets of paper and documentation if you have more than four children.)*

1. Alien Registration Number (A#) (If any)	2. Passport/ID Card No. (If any)	3. Marital Status (Married, Single, Divorced, Widowed)	4. U.S. Social Security No. (If any)
		Married	[redacted]

5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth (mm/dd/yyyy)
Demjanjuk	John	Jr.	08/31/1965

9. City and Country of Birth	10. Nationality (Citizenship)	11. Race, Ethnic or Tribal Group	12. Gender
Parma, USA	USA Citizen	American	☒ Male ☐ Female

13. Is this child in the U.S. ?

☒ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location.)*

14. Place of last entry in the U.S.	15. Date of last entry in the U.S. (mm/dd/yyyy)	16. I-94 No. (If any)	17. Status when last admitted (Visa type, if any)
Cleveland, OH	01/01/1993	n/a	USA Citizen

18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? (mm/dd/yyyy)	20. Is your child in Immigration Court proceedings?
USA Citizen	n/a	☐ Yes ☒ No

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*

☐ Yes *(Attach one photograph of your child in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)*

☒ No

Part 3. Information about your spouse and children. (Continued)

1. Alien Registration Number (A#) *(If any)*	2. Passport/ID Card No. *(If any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security No. *(If any)*
		Divorced	

5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*
Nishnic	Irene	Anastasia	01/03/1960

9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic or Tribal Group	12. Gender
Cleveland, OH	USA Citizen	American	☐ Male ☒ Female

13. Is this child in the U.S.?
☒ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location.)*

14. Place of last entry in the U.S.	15. Date of last entry in the U.S. *(mm/dd/yyyy)*	16. I-94 No. *(If any)*	17. Status when last admitted *(Visa type, if any)*
Born in USA	n/a		USA Citizen

18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	20. Is your child in Immigration Court proceedings?
USA Citizen	n/a	☐ Yes ☒ No

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*
☐ Yes *(Attach one photograph of your child in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)*
☒ No

1. Alien Registration Number (A#) *(If any)*	2. Passport/ID Card No. *(If any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security No. *(If any)*
n/a	n/a	Married	

5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*
Maday	Lydia	n/a	04/07/1950

9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic or Tribal Group	12. Gender
Regensburg, Germany	USA Citizen	American	☐ Male ☒ Female

13. Is this child in the U.S.?
☒ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location.)*

14. Place of last entry in the U.S.	15. Date of last entry in the U.S. *(mm/dd/yyyy)*	16. I-94 No. *(If any)*	17. Status when last admitted *(Visa type, if any)*
New York City	01/01/1952	n/a	Immigrant

18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	20. Is your child in Immigration Court proceedings?
USA Citizen	n/a	☐ Yes ☒ No

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*
☐ Yes *(Attach one photograph of your child in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)*
☒ No

1. Alien Registration Number (A#) *(If any)*	2. Passport/ID Card No. *(If any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security No. *(If any)*

5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*

9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic or Tribal Group	12. Gender
			☐ Male ☐ Female

13. Is this child in the U.S.? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location.)*

14. Place of last entry in the U.S.	15. Date of last entry in the U.S. *(mm/dd/yyyy)*	16. I-94 No. *(If any)*	17. Status when last admitted *(Visa type, if any)*

18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any ? *(mm/dd/yyyy)*	20. Is your child in Immigration Court proceedings?
		☐ Yes ☐ No

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*
☐ Yes *(Attach one photograph of your child in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)*
☐ No

Part A. II. Information about your background

1. Please list your last address where you lived before coming to the U.S. If this is not the country where you fear persecution, also list the last address in the country where you fear persecution. *(List Address, City/Town, Department, Province, or State and Country.)* (NOTE: *Use Supplement B, Form I-589 or additional sheets of paper, if necessary.)*

Number and Street (Provide if available)	City/Town	Department, Province or State	Country	Dates From (Mo/Yr)	To (Mo/Yr)
	Dub Macharenzi	Vinnitsa	Ukrainian SSR	03/1920	01/42
	Feldafing		Germany	01/51	01/52

2. Provide the following information about your residences during the past five years. List your present address first. (NOTE: *Use Supplement B, Form I-589 or additional sheets of paper, if necessary.)*

Number and Street	City/Town	Department, Province or State	Country	Dates From (Mo/Yr)	To (Mo/Yr)
847 Meadowlane	Seven Hills	Ohio	USA	09/1993	Present

3. Provide the following information about your education, beginning with the most recent. (NOTE: *Use Supplement B, Form I-589 or additional sheets of paper, if necessary.)*

Name of School	Type of School	Location (Address)	Attended From (Mo/Yr)	To (Mo/Yr)
Unknown	Village School	Dub Macharenzi, Ukrainian SSR	01/27	1931,2

4. Provide the following information about your employment during the past five years. List your present employment first. (NOTE: *Use Supplement B, Form I-589 or additional sheets of paper, if necessary.)*

Name and Address of Employer	Your Occupation	Dates From (Mo/Yr)	To (Mo/Yr)
Ford Motor Co.	Retired	01/52	10/1982

5. Provide the following information about your parents and siblings (brothers and sisters). Check the box if the person is deceased. (NOTE: *Use Supplement B, Form I-589 or additional sheets of paper, if necessary.)*

Full Name	City/Town and Country of Birth	Current Location
Mother Olga	Ukrainian SSR	☒ Deceased
Father Mykola	Ukrainian SSR	☒ Deceased
Sibling Stefa	Ukrainian SSR	☒ Deceased
Sibling		☐ Deceased
Sibling		☐ Deceased
Sibling		☐ Deceased

Part B. Information about your application

(NOTE: Use Supplement B, Form I-589 or attach additional sheets of paper as needed to complete your responses to the questions contained in Part B.)

When answering the following questions about your asylum or other protection claim (withholding of removal under 241(b)(3) of the INA or withholding of removal under the Convention Against Torture) you should provide a detailed and specific account of the basis of your claim to asylum or other protection. To the best of your ability, provide specific dates, places and descriptions about each event or action described. You should attach documents evidencing the general conditions in the country from which you are seeking asylum or other protection and the specific facts on which you are relying to support your claim. If this documentation is unavailable or you are not providing this documentation with your application, please explain why in your responses to the following questions.

Refer to Instructions, Part 1: Filing Instructions, Section II, "Basis of Eligibility," Parts A - D, Section V, "Completing the Form," Part B, and Section VII, "Additional Evidence That You Should Submit," for more information on completing this section of the form.

1. Why are you applying for asylum or withholding of removal under section 241(b)(3) of the INA, or for withholding of removal under the Convention Against Torture? Check the appropriate box(es) below and then provide detailed answers to questions A and B below:

I am seeking asylum or withholding of removal based on:

- ☐ Race
- ☐ Religion
- ☐ Nationality
- ☐ Political opinion
- ☐ Membership in a particular social group
- ☒ Torture Convention

A. Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in the past by anyone?

☐ No ☒ Yes

If "Yes," explain in detail:

(1) What happened;

(2) When the harm or mistreatment or threats occurred;

(3) Who caused the harm or mistreatment or threats; and

(4) Why you believe the harm or mistreatment or threats occurred.

See attached Supplementary Response to Part B1A

B. Do you fear harm or mistreatment if you return to your home country?

☐ No ☒ Yes

If "Yes," explain in detail:

(1) What harm or mistreatment you fear;

(2) Who you believe would harm or mistreat you; and

(3) Why you believe you would or could be harmed or mistreated.

See attached Supplementary Response to Part B1B

Part B. Information about your application (continued)

2. Have you or your family members ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned in any country other than the United States?

☐ No ☒ Yes

If "Yes," explain the circumstances and reasons for the action.

See attached Supplementary Response to Part B 2

3.A. Have you or your family members ever belonged to or been associated with any organizations or groups in your home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, human rights group, or the press or media?

☐ No ☒ Yes

If "Yes," describe for each person the level of participation, any leadership or other positions held, and the length of time you or your family members were involved in each organization or activity.

See attached Supplementary Response to Part B 3 A

B. Do you or your family members continue to participate in any way in these organizations or groups?

☒ No ☐ Yes

If "Yes," describe for each person your or your family members' current level of participation, any leadership or other positions currently held, and the length of time you or your family members have been involved in each organization or group.

4. Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?

☐ No ☒ Yes

If "Yes," explain why you are afraid and describe the nature of torture you fear, by whom, and why it would be inflicted.

See attached Supplementary Response to Part B 4

Part C. Additional information about your application

(NOTE: *Use Supplement B, Form I-589 or attach additional sheets of paper as needed to complete your responses to the questions contained in Part C.)*

1. Have you, your spouse, your child(ren), your parents or your siblings ever applied to the U. S. Government for refugee status, asylum or withholding of removal?

☐ No ☒ Yes

If "Yes," explain the decision and what happened to any status you, your spouse, your child(ren), your parents or your siblings received as a result of that decision. Please indicate whether or not you were included in a parent or spouse's application. If so, please include your parent or spouse's A-number in your response. If you have been denied asylum by an Immigration Judge or the Board of Immigration Appeals, please describe any change(s) in conditions in your country or your own personal circumstances since the date of the denial that may affect your eligibility for asylum.

I applied for deferral of removal to Ukraine under the Convention Against Torture on the grounds that if removed to Ukraine I would be subjected to severe mistreatment as a result of the climate of hate and hostility towards me created by the United States Department of Justice's false allegations that I was "Ivan the Terrible" of Treblinka. Allegations that the Department of Justice knew or should have known were false at the time they were made, which were disproved in Israel and which the Department of Justice has failed to repudiate. The application for deferral of removal to Ukraine was denied by the Immigration Court and its decision was sustained by the Board of Immigration Appeals.

2. A. After leaving the country from which you are claiming asylum, did you or your spouse or child(ren) who are now in the United States travel through or reside in any other country before entering the United States? ☒ No ☐ Yes

B. Have you, your spouse, your child(ren) or other family members, such as your parents or siblings, ever applied for or received any lawful status in any country other than the one from which you are now claiming asylum?

☐ No ☒ Yes

If "Yes" to either or both questions (2A and/or 2B), provide for each person the following: the name of each country and the length of stay, the person's status while there, the reasons for leaving, whether or not the person is entitled to return for lawful residence purposes, and whether the person applied for refugee status or for asylum while there, and if not, why he or she did not do so.

My wife and children are US citizens as was I until denaturalized in 2001.

3. Have you, your spouse or your child(ren) ever ordered, incited, assisted or otherwise participated in causing harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion?

☒ No ☐ Yes

If "Yes," describe in detail each such incident and your own, your spouse's or your child(ren)'s involvement.

Part C. Additional information about your application (continued)

4. After you left the country where you were harmed or fear harm, did you return to that country?

☒ No ☐ Yes

If "Yes," describe in detail the circumstances of your visit(s) (for example, the date(s) of the trip(s), the purpose(s) of the trip(s) and the length of time you remained in that country for the visit(s).)

5. Are you filing this application more than one year after your last arrival in the United States?

☐ No ☒ Yes

If "Yes," explain why you did not file within the first year after you arrived. You should be prepared to explain at your interview or hearing why you did not file your asylum application within the first year after you arrived. For guidance in answering this question, see Instructions, Part 1: Filing Instructions, Section V. "Completing the Form," Part C.

See attached Supplementary Response C 5

6. Have you or any member of your family included in the application ever committed any crime and/or been arrested, charged, convicted and sentenced for any crimes in the United States?

☐ No ☒ Yes

If "Yes," for each instance, specify in your response: what occurred and the circumstances, dates, length of sentence received, location, the duration of the detention or imprisonment, the reason(s) for the detention or conviction, any formal charges that were lodged against you or your relatives included in your application and the reason(s) for release. Attach documents referring to these incidents, if they are available, or an explanation of why documents are not available.

See attached Supplementary Response to Part C 6

Part D. Your Signature

I certify, under penalty of perjury under the laws of the United States of America, that this application and the evidence submitted with it are all true and correct. Title 18, United States Code, Section 1546(a), provides in part: Whoever knowingly makes under oath, or as permitted under penalty of perjury under Section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement or which fails to contain any reasonable basis in law or fact - shall be fined in accordance with this title or imprisoned for up to 25 years. I authorize the release of any information from my immigration record that U.S. Citizenship and Immigration Services (USCIS) needs to determine eligibility for the benefit I am seeking.

Staple your photograph here or the photograph of the family member to be included on the extra copy of the application submitted for that person.

WARNING: **Applicants who are in the United States illegally are subject to removal if their asylum or withholding claims are not granted by an asylum officer or an immigration judge. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings even if the application is later withdrawn. Applicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act. You may not avoid a frivolous finding simply because someone advised you to provide false information in your asylum application. If filing with USCIS, unexcused failure to appear for an appointment to provide biometrics (such as fingerprints) and your biographical information within the time allowed may result in an asylum officer dismissing your asylum application or referring it to an immigration judge. Failure without good cause to provide DHS with biometrics or other biographical information while in removal proceedings may result in your application being found abandoned by the immigration judge. See sections 208(d)(5)(A) and 208(d)(6) of the INA and 8 CFR sections 208.10, 1208.10, 208.20, 1003.47(d) and 1208.20.**

Print your complete name.	Write your name in your native alphabet.
JOHN DEMJANJUK	IBAH ДЕМ'ЯНЮК

Did your spouse, parent or child(ren) assist you in completing this application? ☐ No ☒ Yes *(If "Yes," list the name and relationship.)*

(Name)	*(Relationship)*	*(Name)*	*(Relationship)*
JOHN DEMJANJUK JR	SON		

Did someone other than your spouse, parent or child(ren) prepare this application? ☐ No ☒ Yes *(If "Yes," complete Part E.)*

Asylum applicants may be represented by counsel. Have you been provided with a list of persons who may be available to assist you, at little or no cost, with your asylum claim? ☐ No ☒ Yes

Signature of Applicant *(The person in Part A.1.)*

[+ John Demjanjuk] 04/02/2009

Sign your name so it all appears within the brackets — Date *(mm/dd/yyyy)*

Part E. Declaration of person preparing form, if other than applicant, spouse, parent or child

I declare that I have prepared this application at the request of the person named in Part D, that the responses provided are based on all information of which I have knowledge, or which was provided to me by the applicant, and that the completed application was read to the applicant in his or her native language or a language he or she understands for verification before he or she signed the application ~~in my presence.~~ I am aware that the knowing placement of false information on the Form I-589 may also subject me to civil penalties under 8 U.S.C. 1324c and/or criminal penalties under 18 U.S.C. 1546(a). SEE ATTACHED DECLARATION OF JOHN DEMJANJUK, JR.

Signature of Preparer	Print Complete Name of Preparer
John Broadley	John Howard Broadley
Daytime Telephone Number	**Address of Preparer: Street Number and Name**
(202) 333-6025	1054 31st Street, Suite 200

Apt. No.	City	State	Zip Code
	Washington	DC	20007

SUPPLEMENT B FORM I-589

ADDITIONAL INFORMATION ABOUT YOUR CLAIM TO ASYLUM.

A # *(If available)*	Date
A 08237417	~~9/6/2005~~ 4-2 2009
Applicant's Name: John Demjanjuk	Applicant's Signature: John Demjanjuk

Use this as a continuation page for any information requested. Please copy and complete as needed.

PART B

QUESTION 1A

Beginning in the late 1970's and continuing through the 1990's I have received anonymous death threats. One of the attorneys defending me was attacked with acid which did permanent damage to one eye. The acid attack on my attorney occurred in 1988 in Israel. The individual who attacked my attorney was arrested but received only a light sentence. I have attached hereto a copy of the August 3, 1993 bench ruling and order of the United States Court of Appeals for the Sixth Circuit that recognized these threats to my life up to that date. In that bench ruling, the court found that "members of his family have been stoned as they left the court proceedings in Israel."

The death threats and attacks have resulted directly from the Office of Special Investigations (U.S. Department of Justice) false allegations that I was the notorious "Ivan the Terrible" of Treblinka. Not only did the Office of Special Investigations make the false allegations, it knowingly withheld from the US courts information that it had in its possession that established that I was not "Ivan the Terrible" of Treblinka. See Demjanjuk v. Petrovsky, 10 F.3d 337 (6th Cir. 1993).

After it extradited me to Israel in 1986 to be tried as "Ivan the Terrible" of Treblinka for the murder of 900,000 holocaust victims, the Office of Special Investigations withheld from the Israeli authorities information that it had in its possession that established that I was not "Ivan the Terrible" of Treblinka. The failure of the Office of Special Investigations to disclose its exculpatory materials to the Israeli prosecution (and to me) led directly to my being convicted of murder by the Jerusalem District Court and sentenced to death in 1988. This was a "trial" held in a converted movie theater and broadcast and reported daily on a global basis for nearly a full year. The Office of Special Investigations' continuing failure to disclose the exculpatory evidence it had in its possession led to my spending eight years in solitary confinement, including five years under sentence of death in Israel.

I attribute the death threats I have received directly to the Office of Special Investigations' false accusations that I was "Ivan the Terrible" of Treblinka, and to its continued failure and refusal to publicly stand and acknowledge that its allegations were false.

SUPPLEMENT B FORM I-589

ADDITIONAL INFORMATION ABOUT YOUR CLAIM TO ASYLUM.

A # *(If available)*	Date
A 08237417	~~9/6/2005~~ 4-2-2009
Applicant's Name: John Demjanjuk	Applicant's Signature: John Demjanjuk

Use this as a continuation page for any information requested. Please copy and complete as needed.

PART B

QUESTION 1B

The Office of Special Investigations has never publicly admitted or acknowledged that its charges that I was "Ivan the Terrible" of Treblinka were false and that it withheld exculpatory evidence from the Israeli prosecution and my defense in Israel which resulted in my initial conviction there. I am greatly concerned that the Office of Special Investigations has applied or will apply pressure on the Ukrainian authorities to prosecute me as Ivan the Terrible of Treblinka, and will use its influence to create a seriously hostile and dangerous environment for me in Ukraine in the same manner it did in Israel. In the course of settlement negotiations that occurred in 1998 - 1999 between the Office of Special Investigations and my attorneys, the Director of the Office of Special Investigations threatened, in the presence of my counsel, my family members, and of the government's attorneys, that if I did not enter into a settlement agreement and were subsequently denaturalized and deported, the Office of Special Investigations would attempt to persuade the country to which I was deported to arrest and prosecute me. I understand that the Director of that office has recently met with the Ukrainian authorities regarding my case and I have no reason to believe that he has changed that intent in the intervening years.

Ukraine suffered under Soviet rule for 70 years and during that time Soviet attitudes towards human rights, and the treatment of individuals and prisoners were adopted in Ukraine and have not yet been eradicated. I have attached a February 28, 2005 Report on Human Rights Practices in Ukraine prepared by the United States Department of State. In that Report, the Department of State cites numerous credible reports that torture and other cruel, inhuman and degrading punishments are widespread in Ukraine. The Report also shows that arbitrary or unlawful deprivation of life occurs, including when persons are in police custody.

I have also attached three recent reports from Amnesty USA which show both the extent to which persons in Ukraine have been subjected to torture, and also that those conditions continued past the Soviet era and exist today. These Amnesty reports lend further weight to the Department of State Report discussed above.

The combination of the climate of extreme hostility that has been created by the Office of Special Investigations' false allegations that I was "Ivan the Terrible" of Treblinka, and the hold-over of Soviet attitudes toward human rights, and the treatment of individuals and prisoners in Ukraine confirmed by the Department of State and Amnesty will subject me to a very serious risk of abuse by the authorities there. In light of my age (85) and generally poor physical condition this will put my life at risk.

SUPPLEMENT B FORM I-589

ADDITIONAL INFORMATION ABOUT YOUR CLAIM TO ASYLUM.

A # (If available)	Date
A 08237417	9/6/2005 4-2-2009
Applicant's Name John Demjanjuk	**Applicant's Signature** John Demjanjuk

Use this as a continuation page for any information requested. Please copy and complete as needed.

PART B

QUESTION 2

I was detained, accused, charged, convicted and sentenced to death in Israel in 1986 - 1988 for murder and war crimes based on information provided to the Israeli government by the Office of Special Investigations that I was "Ivan the Terrible" of Treblinka. The Israeli Supreme Court reversed the conviction when exculpatory evidence, some of which had been in the possession of the Office of Special Investigations for many years, was obtained from the former Soviet Union in 1993.

There have been several accusations made against me in other countries that show the widespread impact of the Office of Special Investigations' false charges that I was "Ivan the Terrible" of Treblinka. I have attached copies of some reports of such accusations.

Edward W. Nishnic who has assisted in my defense for many years was investigated, questioned and cleared of charges of obstruction of justice in Israel in connection with the testimony of one of the defense witnesses.

SUPPLEMENT B FORM I-589

ADDITIONAL INFORMATION ABOUT YOUR CLAIM TO ASYLUM.

A # (if available) A 08237417	Date ~~9/6/2005~~ 4-2-2009
Applicant's Name John Demjanjuk	Applicant's Signature John Demjanjuk

Use this as a continuation page for any information requested. Please copy and complete as needed.

PART B

QUESTION 3A

Komsomol: While a teenager in Ukraine I was a member of the Komsomol, the youth wing of the Communist Party of Ukraine. I remained a member of the Komsomol while I was in the Red Army after 1940 until I was captured by the Germans in the spring of 1942. I held no leadership position.

Red Army: I was drafted into the Red Army in 1940 and served in the Artillery until the spring of 1942 when I was captured by the Germans. During the entire time my rank was the equivalent of private. I was neither a commissioned nor a non-commissioned officer.

Supplement B, Form I-589

Additional Information About Your Claim (Continued)

A# (If available)	Date
A08237417	4/1/2009
Applicant's Name	**Applicant's Signature**
John Demjanjuk	John Demjanjuk

NOTE: *Use this as a continuation page for any additional information requested. Please copy and complete as needed.*

Part B

Question 4

See Attached Statement.

Supplementary Response to Part B 4

Are you afraid of being subjected to torture in your home country or any other country to which you may be returned? If yes, explain the nature of torture you fear, by whom, and why it would be inflicted.

New Developments and Changed Conditions Since Original Application for Deferral

Since I filed my original application for deferral of removal pursuant to the Convention Against Torture ("CAT") on October 7, 2005 several developments have occurred that require the filing of an additional application, or the substantial amendment of the original application. These new developments are treated as the basis for a new application. If the proper procedural avenue is to seek to reopen the proceeding and amend the existing application, I request that this I-596 be treated as a motion to reopen and an amendment to the CAT application filed with the Immigration Court on October 7, 2005.

1. Decision by the German authorities to arrest, jail and prosecute. Since my October 7, 2005 application, on information and belief, the Federal Republic of Germany has decided to accept my deportation to Germany. In addition, the State prosecutor in Munich has issued a warrant for my arrest and, again on information and belief, the State prosecutor intends to have me arrested when I enter Germany, jailed, and tried as an accessory to murder. Based on information I have received from my attorney in Germany, the State prosecutor's theory is novel and has not previously been used by the German authorities in any prosecution of alleged concentration camp guards in that country. In 2005 there appeared little or no chance that even if I were deported to Germany the German authorities would either arrest, jail or prosecute me. Developments in the past several weeks have changed that situation as I have outlined above.

2. Significant health deterioration since October 2005. Since my October 7, 2005 application my health has deteriorated significantly as follows:

- I am now almost four years older, which at age 89 is a significant change.
- I am suffering from and being treated for Myelodysplastic Syndrome (MDS) which is a disorder of the bone marrow and a pre-cursor to leukemia. I receive weekly treatment with Procrit for this condition and periodically have required blood transfusions.
- I am suffering from and being treated for Chronic Kidney Disease (CKD Stage 3).
- I am suffering from anemia and leucopenia associated with the MDS and CKD conditions.
- I am suffering from and being treated for hyperoxaluria and kidney stones.
- I am suffering from and being treated for arthritis, gout and spinal stenosis.

With the exception of the arthritis, gout and spinal stenosis, these conditions have manifested themselves since my October 2005 CAT application. The arthritis, gout and spinal stenosis have become much worse and seriously impede my ability to move and take care of myself. I frequently need assistance in rising from a chair and extended sitting is very painful. Copies of the most recent medical reports supporting this description of my present state of health are attached.

Why Arrest, Incarceration and Trial in Germany would be Torture

My present physical condition is described above. I will be 89 years old on April 3, 2009 and in general my health is poor. I suffer from the conditions described above. I am physically very weak and experience severe spinal, hip and leg pain which limits mobility and causes me to require assistance to stand up and move about. Spending 8 to 12 hours in an airplane seat flying to Germany would be unbearably painful for me.

I am very familiar with life as a prisoner. First I was a prisoner-of-war of the Germans after my capture in 1942, and subsequently I was a prisoner of the Israelis held in solitary confinement in an Israeli jail cell from early 1986 to 1993. During my time in solitary in an Israeli jail, they tried me, sentenced me to death, and ultimately acquitted me when incontrovertible evidence was presented that "Ivan the Terrible" was an individual named "Ivan Marchenko." As a prisoner of the Germans I was aged 22 - 25. As a prisoner of the Israelis I was aged 66 - 73 and in reasonably good physical and mental health. I am now age 89 and my health is poor. I could not care for myself in an ordinary jail cell as I need assistance to perform many functions, particularly those requiring rising, standing, and moving around. I spend many hours each day laying in bed to provide some relief to my lower back pain. Incarceration under conditions similar to those I experienced in Israel would subject me to severe physical pain and suffering.

Spending 8 years in solitary confinement, 6 of them under sentence of death, is a psychological experience that leaves permanent scars, fears and vulnerabilities. I have serious doubts whether I could withstand incarceration and the terrible psychological strain of another trial at my age and in my weakened physical state. After my experience in Israel, the prospect of another "show trial," complete with emotional witnesses testifying to what they want to be true, not to what is true, is a nightmare that is unimaginable to someone who has not experienced it.

Finally, I will raise the issue of the effect of another round of arrest, jail and trials on my family. The effect of the events from 1976 to today on my wife of over 60 years, and my three children and their families has been traumatic. My son, John Demjanjuk, Jr., has lived with the Justice Department's vendetta against me since he was 11 years old, through his teenage years and for all of his adult life. He is now 43 years old. My daughters were older when it began in 1976, but the impact on their lives and families may have been even more severe. I have been subjected to three major trials. The first of these was from 1977 when the Justice Department filed its denaturalization complaint to early 1986 which I was extradited to Israel. The second of these was from early 1986 when I was extradited to Israel and tried and convicted of murder to 1993 when the Israeli Supreme Court acquitted me and sent me back to the United States. The third was from 1999 when the Justice Department filed its second denaturalization complaint against me to today when I am facing the prospect of deportation to Germany and a likely fourth major trial there. The prospect of my family having to go through this experience for a fourth time is intensely painful to me.

Why Would the German Authorities Subject Me to this Treatment

This question calls for some speculation on the motives of the German authorities. I understand that the Office of Special Investigations (OSI), which has been the center of the Justice Department vendetta against me, has been trying to induce other countries (including Germany) to accept my deportation and to prosecute me. After the US Court of Appeals found that Office of Special Investigations' attorneys had committed a fraud on the court by withholding exculpatory evidence from the defense (and from the Israeli prosecutors), I did not expect OSI to rest until they had denaturalized me, deported me and put me on trial somewhere for something. I am sure that the record of the efforts of OSI to do this will eventually come to light.

The motivation of the German authorities is more difficult to understand. We have read in the press that certain organizations have been bringing pressure on the German authorities to undertake proceedings against me. This is consistent with the activities of these same organizations in promoting my extradition to Israel and trial there as "Ivan the Terrible." Why the German authorities should have yielded to such pressure is more difficult to understand. One possible reason is that the German authorities have not aggressively prosecuted German war criminals and have been subjected to considerable criticism on this account. It is possible that the German authorities see a prosecution of me as means to draw attention away from their past approach. Whether the German authorities are responding to outside pressure (including pressure from OSI) or are trying to divert attention from their own prior practices, they appear determined to arrest, jail and prosecute me despite the pain and suffering it will cause, and it can be inferred <u>because</u> of the pain and suffering it will cause me and my family.

<u>Summary</u>

In summary, the German authorities appear determined to arrest, incarcerate and try me again for alleged war crimes, notwithstanding the Israeli Supreme Court acquitted me of charges that included the same factual allegations that the German prosecutor appears to be planning. At my age, in light of my poor physical condition and the traumatic experiences I have undergone at the hands of the US Justice Department, the Israelis, and the US Justice Department a second time, this will expose me to severe physical and mental pain that clearly amounts to torture under any reasonable definition of the term. The effect is magnified by the serious adverse effect that further proceedings will have on my family.

+ John Demjanjuk

CLEVELAND CLINIC CANCER CENTER
AT PARMA COMMUNITY GENERAL HOSPITAL
8525 Powers Blvd., Parma, OH 44129
Ph: 440-743-4747 Fax 440-743-4715

NAME: DEMJANJUK, John
CLINIC NO: 48648207
DATE OF SERVICE: 07/15/2008

DIAGNOSIS:
1. Myelodysplastic syndrome
2. Persistent anemia secondary to above

John Demjanjuk returned to clinic for follow up with his wife. He stated he is still weak despite receiving 2 units of blood transfusion around a month ago. He has received 2 doses of Procrit injection (every 2 weeks) since last visit. Symptom wise, he does not feel much different. He denies any fever, chills, night sweats or weight loss. His main complaint is weakness and his knee bothers him. His knee problem is pre-existing. He denies any chest pain, shortness of breath at rest or palpitations. No GI or GU complaints. No bleeding at all. No easy bruising.

His past medical history, personal/social history, medications and allergies were all reviewed.

REVIEW OF SYSTEMS: All 10 systems were reviewed. Except what is described above, the rest of the review of systems was completely unremarkable.

PHYSICAL EXAM: GENERAL: Patient appears at his baseline, comfortable, not in distress. He is afebrile with temperature 96, pulse 64, respiratory rate 20, blood pressure 122/64, weight 225 pounds. HEENT: Pale, no jaundice. Normal oropharynx on visual exam. RESPIRATORY SYSTEM: Lungs clear to auscultation bilaterally. No wheezing, rhonchi or crackles. Chest movement symmetrical. Trachea midline. CARDIOVASCULAR SYSTEM: Heart sounds S1, S2 with regular rate and rhythm. No gallops or additional heart sounds. GASTROINTESTINAL SYSTEM: Abdomen is soft, obese and nontender, nondistended. Normal active bowel sounds. No palpable mass or hepatosplenomegaly. MUSCULOSKELETAL SYSTEM: Decreased range of motion in major joints, symmetrical. No asymmetrical muscle weakness. Trace edema in lower extremities.

LABORATORY TESTS: WBC 2.4, hemoglobin 9.5, hematocrit 28.3, platelet count 210,000. Creatinine 1.8, BUN 36, total bilirubin 0.6.

ASSESSMENT/PLAN:
1. Myelodysplasia, responding poorly to Procrit therapy, although he only received 2 doses so far. I will continue the treatment and increase frequency of Procrit injection to every week if possible.
2. Chronic renal failure. I will refer him to nephrologist for nephrology consultation.
3. I advised the patient and his wife to bring his son with him during the next visit in one month. I will discuss chemotherapy with hypermethylating agent with them. Patient does not really understand much English, therefore, I feel that the language barrier is really affecting his informed decision-making ability. He will probably benefit from hypermethylating agent like Vidaza or Dacogen, if he could tolerate. We will discuss more in detail next time.
4. Given his symptomatic anemia, I offered the patient another 2 units of blood transfusion. He understood my recommendation, however, he could not make any decision when I asked him whether he would like to have a blood transfusion, his answer was "I do not know". This is quite frustrating. I advised him and his wife to go home and talk to his son and if he changes his mind on blood transfusion he will call and let me know. I will be happy to schedule it for him.

Total counseling time was about 40 minutes. This apparently is a difficult patient to take care of.

Wei Lin, M.D.

cc:
Date Dictated: 07/15/2008

Date Typed: jlb 07/17/2008 09:00

OFFICE HOURS BY APPOINTMENT

KEUCK CHANG, M.D.
DIPLOMATE IN NEPHROLOGY

6789 RIDGE RD., SUITE 203
PARMA, OHIO 44129

TEL: 440-888-4426
FAX: 440-888-5033

NAME: Demjanjuk, John
Birth date:04/03/1920 Age: 88 Gender: Male

Emergency contact:
Privacy:family Marital status/Occup:
Insurance: I
Chart No:8903a 8/08 227 160-170/70 Prob:

DATE: 09/08/2008 WT 227 BP 152/70 HT 6'
consult office visit with lab, us renal
99214
Follow up with Dr. Goliat for primary care
Follow up with Dr. Lin

x 72 inches / 3131
Body Surface 2.284
72.1 ml/min → 54.6 ml/m/1.73

Entitled for Social security → Medicare refused to pay for pramit
→ Had Ford Co. to assume primary provider HMO health Pl.
received pramit 4 wks ago

130/60 both arms.
JVD ⊖
Heart lungs clear.
abd. soft, Kidneys not palpable
Pitting ⊖

plan:
1. To call result of Vit D level
2. Tums one c each meal

1. CKD. (Stage 3.) 54.6 ml/min/1.73.
2. Hyperoxaluria Hyperoxaluria..
3. Anemia – MDS, CKD.
4. Kidney stones. Hyperoxaluria? (Tums) ↑ calcium, Renal function pl 4(M)

Wife answered. 9/9 Talked to pt. Vit D 400 IU/d

1-12-09. 4:30

return date:

signature:

TIMMAPPA P. BIDARI, MD., INC.

JANUARY 19, 2009

DEMJANJUK, JOHN

DIAGNOSIS:
1. Myelodysplastic syndrome.
2. Anemia and leukopenia secondary to above.
3. Acute gout in the right big toe and the mid foot.

HISTORY OF PRESENT ILLNESS: He says he was coming along okay he started having severe pain in the right big toe and the middle of the foot since yesterday he has taken Colchicine but has run out of the medication.

REVIEW OF THE SYSTEMS:
Musculoskeletal System: As above.
General and Constitutional Symptoms: Has moderate degree of fatigue, denies fever and chills, night sweats, or weight loss.
Cardiovascular System: Has shortness of breath on exertion, no leg edema, or chest pain.
Head: Denies pressure or pain.
Eyes: Denies blurred vision.
ENT and Respiratory System: Unremarkable.
Skin: Denies rash, itching, or easy bruising. He has redness of the skin over the right big toe due to gout.
GI System: Denies abdominal pain, nausea, or vomiting.
Hemic and Lymphatic System: Has not felt any lumps under the arms, in the neck, or groins.
GU System: No dysuria or burning micturition has urinary frequency.
CNS: Has occasional lightheadedness.

SOCIAL HISTORY: As recorded previously.

PAST HISTORY: As recorded previously.

FAMILY HISTORY: As recorded previously.

PHYSICAL EXAM: Today reveals a B/P of 140/60; pulse rate is 72, respirations 18, temperature normal. Weight. 218 pounds. Head. Normal. Eyes. Conjunctival pallor noted no jaundice. ENT: Unremarkable. Neck. No lymphadenopathy. Chest. No sternal tenderness. Heart: Sounds normal. Lungs: Clear. Abdomen: No tenderness, no distention. Extremities: No leg edema, redness of the skin noted over the dorsum of the right big toe.

LABORATORY DATA: Today CBC shows hemoglobin of 9.8, hematocrit 29.2, WBC 3,100, and platelets 277,000.

TREATMENT PLANS: Give Procrit 60,000 units subcutaneously today.

I have prescribed him Colchicine 0.6 mg to take 1 daily for gouty arthritis in the right big toe and the foot.

Continue weekly Procrit and CBC, re-exam in two week's time.

TIMMAPPA P. BIDARI
TPB/djk

TIMMAPPA P. BIDARI, M.D., INC.
PHOENIX MEDICAL CENTRE
6020 RIDGE RD., SUITE 204
PARMA, OH 44129
Telephone: (440) 887-9570

DIPLOMATE AMERICAN BOARD OF
INTERNAL MEDICINE
DIPLOMATE IN THE SUBSPECIALTY OF
1. ONCOLOGY
2. HEMATOLOGY

4/6/09.

Ref: John Demjanjuk.

To Whom it may concern:

This 88 yr old Gentleman is under my care since 29th Sept 2008. He has established Diagnosis of Myelo Dysplastic Syndrome since oct 2004. Previously he was under care of Different Hematologists and apparently one of them Dr. Lin had suggested possible chemotherapy He has received Procrit injections in the past. In my office he initially received 40,000 units once a wk, which was not effective in improving his Hemoglobin & Hematocrit. For the past few months he is getting PROCRIT inj 60,000 units once wkly. Family raised the issue of whether John needs chemotherapy. We briefly talked about it. I suggested a Bone marrow test and Chromosome studies before deciding about it.

Yours sincerely

Timmappa P. Bidari

GIUSEPPE ANTONELLI, M.D.
Rheumatology and Internal Medicine
6789 Ridge Rd., Suite 108
Parma, Ohio 44129
(440)743-7100
Fax (440)743-7101

April 6, 2009

RE: John Demjannuk
DOB: 4-3-20

To Whom It May Concern,

Mr. Demjannuk is under my care for severe spinal stenosis and arthritis with chronic back and leg pains which requires supervision and analgesics.

If you have any questions, please conctact my office.

Sincerely,

Giuseppe Antonelli, M.D.

Supplement B, Form I-589

Additional information for answer to Part C, Question 5

A# (If available)	Date
A08237417	4/1/2009
Applicant's Name	**Applicant's Signature**
John Demjanjuk	John Demjanjuk

NOTE: *Use this as a continuation page for any additional information requested. Please copy and complete as needed.*

Part C

Question 5

Removal proceedings were commenced against me in 2004 to remove me to Ukraine, Poland or Germany. I applied for deferral of removal to Ukraine under the Convention Against Torture based on the climate of hate that the Department of Justice had created against me, and Ukraine's history and practice of torture in its prisons. At that time, I had no reason to believe that if I were removed to Germany I would be arrested or in the event of arrest subjected to severe mistreatment amounting to torture. Within the past few weeks it has become apparent that the German government has decided to accept deportation and to arrest, imprison and try me for some of the same crimes for which I was tried and acquitted in Israel. Arrest, imprisonment and trial in Germany for crimes for which I have already been acquitted would amount to severe mistreatment amounting to torture under the Convention Against Torture in view of my age (89 on 4/3/09) and my poor health as outlined in the attached medical reports. On information and belief, these changed circumstances in Germany which will result in my torture have been brought about by actions of representatives of the Department of Justice.

In summary, at the time I filed my original application for deferral of removal, I had no reason to believe that removal to Germany (as opposed to Ukraine) would result in actions by the German authorities that would amount to torture.

SUPPLEMENT B FORM I-589

ADDITIONAL INFORMATION ABOUT YOUR CLAIM TO ASYLUM.

A # (If available)	Date
A 08237417	~~9/6/2005~~ 4-2-2009
Applicant's Name: John Demjanjuk	Applicant's Signature: John Demjanjuk

Use this as a continuation page for any information requested. Please copy and complete as needed.

PART C

QUESTION 6

I was arrested in the United States in 1985 for extradition to the State of Israel pursuant to an extradition order.

As a result of my arrest and extradition, as noted above, I was indicted, tried and convicted of murder by the Jerusalem district court and sentenced to death. The verdict was overturned by the Israeli Supreme Court when evidence was produced from the former Soviet Union that "Ivan the Terrible" of Treblinka was someone other than me. The extradition order was subsequently overturned in 1993 (see Demjanjuk v. Petrovsky, 10 F.3d 337 (6th Cir. 1993)) because the court found that the Office of Special Investigations had committed a fraud on the court. The Sixth Circuit paroled me back to the United States . See August 3, 1993 Bench Ruling attached to B1A hereto. The US District Court for the Northern District of Ohio subsequently overturned the denaturalization order it had entered against me in 1981 on the grounds that the Office of Special Investigations had committed the same frauds on the court identified by the Sixth Circuit Court of Appeals, and had also committed additional frauds identified by the district court. See United States v. Demjanjuk, N.D. Ohio No. C77-923 (1998 U.S. Dist. LEXIS 4047, Feb. 20, 1998).

As a result of the fraudulent conduct of the Office of Special Investigations I spent 8 years in jail, one year in US custody prior to my extradition, two years in Israeli custody prior to my conviction of murder and sentence to death, and five years under sentence of death in Israel, all in solitary confinement.

The documents relating to the foregoing events are numerous and extensive. They are summarized or described in numerous reported decisions of the US district courts and the Sixth Circuit Court of appeals, particularly (though not exclusively) the following:

1. United States v. Demjanjuk, 518 F.Supp. 1362 (N.D. Ohio 1981) (revoking my citizenship and naturalization);
2. United States v. Demjanjuk, 680 F.2d 32 (6th Cir. 1982) (per curiam) (affirming Demjanjuk 1.)
3. Demjanjuk v. Petrovsky, 612 F. Supp. 571 (N.D. Ohio 1985) (denying habeas, thus allowing the executive branch to extradite me to Israel);
4. Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985) (affirming Demjanjuk 3);
5. Demjanjuk v. Petrovsky, 10 F.3d 337 (6th Cir. 1993) (reopening the case sua sponte, after I was extradited to Israel and there acquitted of all crimes, and holding that the Government perpetrated a fraud on the court in its discovery, and accordingly vacated Demjanjuk 3); and
6. United States v. Demjanjuk, No. C77-923, 1998 U.S. Dist. LEXIS 4047 (N.D. Ohio 1998) (setting aside Demjanjuk 1, on the basis of the findings of prosecutorial misconduct in Demjanjuk 5 and other prosecutorial misconduct).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
ARLINGTON, VIRGINIA

In the Matter of John Demjanjuk **In removal proceedings**	File No. A 08 237 417

DECLARATION OF JOHN DEMJANJUK, JR.

On April 2, 2009 I reviewed the I-589 Application to which this Declaration is attached with my father and read to him in Ukrainian the sections he could not understand in English. I was careful to review all the sections that differ from the I-589 that Mr. Demjanjuk signed in October 2005, specifically Supplemental Responses B 4 and C 5.

Mr. Demjanjuk signed the I-589 form in my presence and I transmitted the signed form to Mr. Demjanjuk's attorney, John Broadley, by e-mail.

Certification Pursuant to 28 USC 1746

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 2, 2009: 

John Demjanjuk, Jr.

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

OMB#1125-0005

Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals

I hereby enter my appearance as attorney or representative for, and at the request of, the following named person:

DATE (mm/dd/yy): 4/6/09

NAME: JOHN (First) DEMJANJUK (Middle Initial) (Last)

ADDRESS: 847 MEADOWLANE ROAD (Number and Street) (Apt. No.)

SEVEN HILLS OHIO (City) (State) (Zip Code)

ALIEN NUMBER(S) (List lead alien number and all family member alien numbers and names, if applicable. Continue on next page as needed.)
A08 237 417

For a disciplinary case, check box ☐ and write in case number in space above.

Please check one of the following:

☒ 1. I am a member in good standing of the bar of the highest court(s) of the following state(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia:

Full Name of Court	State Bar No. (if applicable)
DISTRICT OF COLUMBIA	238089
CALIFORNIA	47506

(Please use space on reverse side to list additional jurisdictions.)

■ am not (or ☐ am - explain fully on reverse side) subject to any order of any court or administrative agency disbarring, suspending, enjoining, restraining, or otherwise restricting me in the practice of law and the courts listed above comprise all of the jurisdictions (other than federal courts) where I am licensed to practice law.

☐ 2. I am an accredited representative of the following qualified non-profit religious, charitable, social service, or similar organization established in the United States, so recognized by the Executive Office for Immigration Review pursuant to 8 C.F.R. § 1292.2 (provide name of organization and expiration date of accreditation):

☐ 3. I am a law student or law graduate, reputable individual, accredited official, or other person authorized to represent individuals pursuant to 8 C.F.R. § 1292.1 (explain fully on reverse side).

I have read and understand the statements provided on the reverse side of this form that set forth the regulations and conditions governing appearances and representation before the Board of Immigration Appeals. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

SIGNATURE OF ATTORNEY OR REPRESENTATIVE: X John Broadley

EOIR ID#:

DATE (mm/dd/yy): 4/6/09

NAME OF ATTORNEY OR REPRESENTATIVE (type or print): JOHN BROADLEY

ADDRESS: 1054 31ST ST NW STE 200
WASHINGTON, DC 20007
☐ Check here if new address

PHONE NUMBER (with area code): 202-333-6025

FAX NUMBER (with area code): 301-942-0676

Form EOIR - 27
Rev. May 2006

Proof of Service

I JOHN BROADLEY (Name) mailed or delivered a copy of the foregoing Form EOIR-27 on 4/7/09 (Date-mm/dd/yy)

to the DHS (U.S. Immigration and Customs Enforcement - ICE) at 1240 EAST 9th ST, CLEVELAND, OH 44199 (Number and Street, City, State, Zip Code)

X John Broadley
Signature of Attorney or Representative

APPEARANCES - An appearance shall be filed on a Form EOIR-27 by the attorney or representative appearing in each appeal or motion to reopen or motion to reconsider before the Board of Immigration Appeals (see 8 C.F.R. § 1003.38(g)), even though the attorney or representative may have appeared in the case before the Immigration Judge or the U.S. Citizenship and Immigration Services. When an appearance is made by a person acting in a representative capacity, his/her personal appearance or signature constitutes a representation that, under the provisions of 8 C.F.R. part 1003, he/she is authorized and qualified to represent individuals. Thereafter, substitution or withdrawal may be permitted upon the approval of the Board of a request by the attorney or representative of record in accordance with *Matter of Rosales*, 19 I&N Dec. 655 (1988). Please note that appearances for limited purposes are not permitted. *See Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986). Further proof of authority to act in a representative capacity may be required.

REPRESENTATION - A person entitled to representation may be represented by any of the following:

(1) Attorneys in the United States as defined in 8 C.F.R. § 1001.1(f).

(2) Law students and law graduates not yet admitted to the bar as defined in 8 C.F.R. § 1292.1(a)(2).

(3) Reputable individuals as defined in 8 C.F.R. § 1292.1(a)(3).

(4) Accredited representatives as defined in 8 C.F.R. § 1292.1(a)(4).

(5) Accredited officials as defined in 8 C.F.R. § 1292.1(a)(5).

All representatives must comply with the specific requirements to represent aliens before the Board of Immigration Appeals. For more information on the requirements, see 8 C.F.R. § 1292.1 and the particular subsections referenced above as applicable. Note that law students and law graduates must submit additional materials pursuant to 8 C.F.R. § 1292.1(a)(2).

FREEDOM OF INFORMATION ACT - This form may not be used to request records under the Freedom of Information Act or the Privacy Act. The manner of requesting such records is contained in 28 C.F.R. §§ 16.1 - 16.11 and appendices. For further information about requesting records from the EOIR under the Freedom of Information Act, see How to File a Freedom of Information Act (FOIA) Request With the Executive Office for Immigration Review, available through the EOIR's website at http://www.usdoj.gov/eoir.

CASES BEFORE THE EOIR - Automated information about cases before the EOIR is available by calling 1-800-898-7180.

ADDITIONAL INFORMATION:

(Please attach additional sheets of paper if necessary.)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of John Demjanjuk	)	File No. A 08 237 417
In removal proceedings	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April I caused a copy of the foregoing MOTION TO REOPEN in the captioned proceeding to be served on the District Counsel of the Department of Homeland Security (ICE) by hand delivery at:

Office of Chief Counsel, DHS/ICE
1240 East 9th Street, Room 585
Cleveland, Ohio 44199

and on the Office of Special Investigations which has handled the case before the Board by hand delivery of a copy thereof to:

Eli Rosenbaum
Director
Office of Special Investigations
1301 New York Avenue, Suite 200
Washington, D.C.

John Broadley

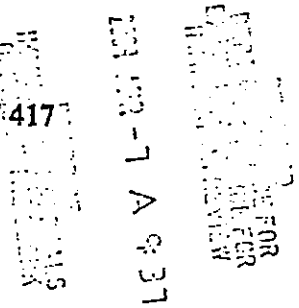
Dated April 7, 2009

ATTACHMENT B

John H. Broadley
John H. Broadley & Associates, P.C.
1054 31st Street NW, Suite 200
Washington, D.C. 20007

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of John Demjanjuk	File No. A 08 237 417
In removal proceedings	



EMERGENCY MOTION TO STAY REMOVAL

John Demjanjuk, the respondent, by his undersigned attorneys, hereby moves the Board for an order staying the removal order entered against him on December 28, 2005 and affirmed by the Board on December 21, 2006. A Motion to Reopen these proceedings has been filed simultaneously with this Motion for a Stay seeking to reopen the removal proceedings against him to hear evidence of changed country conditions in Germany, one of the countries to which he has been ordered removed, that warrant deferral of removal pursuant to the Convention Against Torture.

1. Prior Proceedings

The Chief Immigration Judge entered a final order December 28, 2005 that Mr. Demjanjuk be removed to Ukraine, Poland or Germany and denied Mr. Demjanjuk's application for deferral of removal to Ukraine pursuant to the Convention Against Torture. That decision was upheld by the Board of Immigration Appeals on December 21, 2006, and affirmed by the United States Court of Appeals for the Sixth Circuit on January 30, 2008, *Demjanjuk v. Mukasey*, 514 F.3d 616 (6th Cir. 2008). The Supreme Court denied certiorari on May 19, 2008, *Demjanjuk v. Mukasey*, 128 S.Ct. 2491 (mem.), 171 L.Ed.2d 780. A copy of the Board's December 21, 2006 decision is attached hereto as Attachment No. 1.

2. Changed Country Conditions Justifying Reopening

At the time the Immigration Judge ordered Mr. Demjanjuk's removal to Germany in December 2005 he had no reason to expect that he would be subject to any action by the German authorities that would amount to torture under the Convention Against Torture and the implementing regulations (8 CFR 1208.18). Specifically, there was no reason to believe that the German authorities would seek to arrest, jail or prosecute him if he were removed to Germany. To the best of Mr. Demjanjuk's knowledge and the knowledge of his attorneys at the time the

German judicial authorities undertook prosecutions only for specific acts for which they had evidence and which would constitute a crime. Mr. Demjanjuk has denied participating or being present at any death camps or concentration camps including Sobibor, Treblinka, Majdanek or Flossenbürg.

Since the original removal order was entered, Mr. Demjanjuk's health has seriously deteriorated to the point where arrest, incarceration and trial would subject him to severe physical and mental pain. The surrounding circumstances strongly support an inference that this is the purpose of the German authorities and their specific intent. The Board is respectfully referred to the accompanying Motion to Reopen for an elaboration of the changed country circumstances that warrant reopening and demonstrate the substantial probability of success on the merits.

3. Execution of the removal order is imminent

The German authorities issued an arrest order for Mr. Demjanjuk on March 10, 2009. On information and belief, the Respondent believes that the German authorities have notified the United States that they will accept Mr. Demjanjuk's deportation. In its Opposition to Respondent's Motion to Reopen mistakenly filed in the Immigration Court, the Government conceded that the German authorities had done so. (Government Opposition p. 4). that the Respondent has reason to believe that the execution of the removal order is imminent.

On April 2, 2009 CNN Wire reported that the German Justice Ministry spokesman Ulrich Standigl said that they expect Mr. Demjanjuk "to arrive in Germany Monday" (April 6, 2009). There were reports from the State Prosecutor's office in Munich to the same effect and similar reports in the United States and German Press. Mr. Demjanjuk filed a Motion to Reopen and an Emergency Motion for a Stay with the Immigration Court on April 2, 2009. On April 3, 2009

the Immigration Court issued a stay but withheld decision on the Motion to Reopen. On April 6, 2009 the Immigration Court returned the Motion to Reopen on the grounds that the Immigration Court did not have jurisdiction and the Motion should have been filed with the Board. The Immigration Court continued the stay in effect until April 8, 2009.

The Immigration and Customs Enforcement division of the Department of Homeland Security (ICE) conducted a physical examination of Mr. Demjanjuk on April 2, 2009 to determine whether he is fit for travel to Germany and the medical report appears to have been consistent with that conclusion.[1] Attached is a copy of the ICE decision denying an administrative stay of removal. (Attachment No. 2).

4. An emergency stay is warranted

An emergency stay is warranted in these circumstances to permit the Board to consider Respondent's Motion to Reopen.

The Respondent is effectively "in custody." He is primarily bed-ridden at home as can be easily seen from the video clip attached to the Motion to Reopen and ICE has affixed a GPS Monitor to him. (*See* Government Opposition at p.4). Respondent is facing imminent removal when the Immigration Court's stay expires on April 8, 2009.

The traditional four part test for the granting of a stay looks at (i) probability of success on the merits, (ii) the risk of irreparable harm to the applicant, (iii) the harm to other parties, and (iv) the public interest. Under these criteria a stay is warranted.

A. The Board is respectfully referred to Respondent's Motion to Reopen for argument on the probability of success on the merits.

[1] No copy of the medical report has been provided to Respondent.

B. Failure of the Board to stay his removal pending disposition of the Motion to Reopen will clearly cause him irreparable harm. Once Respondent is removed the Board's regulations treat the Motion to Reopen as withdrawn. 8 CFR 1003.2(d). Respondent's right to obtain a review of his Convention Against Torture claim would be permanently lost and he would be exposed to the very conditions he fears.

C. No other party would be injured. Mr. Demjanjuk has lived a blameless life since immigrating to the United States in 1952. He is currently bed ridden and cannot take care of himself. He poses a threat to no one. The proposition that any other party could be injured if a stay is granted is ludicrous.

D. The public interest would not be harmed if a stay is granted to permit the Board to consider Respondent's Convention Against Torture claim. While Congress has withdrawn most rights for relieving Respondent from removal, it has expressly permitted deferral of removal where the Respondent would face torture in the country to which he would be removed. Granting of the stay would further precisely the public policy that Congress established in permitting a deferral of removal under such circumstances.

Moreover, the Government's contentions regarding the overwhelming public interest in removing persons accused of assisting the Germans in their death camps and concentration camps are belied by the actions of the very same Office of Special Investigations here arguing for removal of a sick old man. In the Tannenbaum case, the Department of Justice allowed another sick old man to remain in the United States who had *admitted* to mistreatment of prisoners in a forced labor camp. *See* Attachment No. 3.

CONCLUSION

It is clear from the above that ICE is prepared to execute the removal order within days if not hours of the expiration on April 8 of the Immigration Court's stay of removal. It is also clear from the above and from the accompanying Motion to Reopen that the removal of Mr. Demjanjuk to Germany where he will be arrested, jailed and prosecuted will subject him to severe physical and mental pain that amounts to torture under the Convention Against Torture as implemented in the United States.

In order to give the Board time to review the Motion to Reopen the Board should grant an emergency stay of the order of removal against the Respondent.

Respectfully submitted,

JOHN DEMJANJUK

By: John Broadley
One of his attorneys

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Dated: April 7, 2009

ATTACHMENT NO. 1

BOARD DECISION OF DECEMBER 21, 2006

FAX TRANSMISSION

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
5107 LEESBURG PIKE, SUITE 2000
FALLS CHURCH, VA 22041

PHONE.....703-605-1007

TO: John Broadley	DATE: 12-21-06
OFFICE: Attorney for Respondent	PAGES: 20
FAX#: (202) 333-5685 PHONE#: (202) 333-6025	TIME: 2:42p.m.
FROM: CAMELLA , DOCKET TEAM	

Board Of Immigration Appeals/Clerks Office
Docket Team

Phone: (703) 305-0445
Fax: (703) 605-5235

SUBJECT: COPY OF BOARD DECISION FOR A08-239-417 , DEMJANJUK, John

COMMENTS:

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Broadley, John, Esquire
1054 31st Street NW, Suite 200
Washington, DC 20007-0000

ICE Office of Chief Counsel/CLE
1240 E. 9th St., Suite 519
Cleveland, OH 44199

Name: DEMJANJUK, JOHN

A08-237-417

Date of this notice: 12/21/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
HURWITZ, GERALD S.
MILLER, NEIL P.
OSUNA, JUAN P.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A08 237 417 - Cleveland

Date: DEC 21 2006

In re: JOHN DEMJANJUK a.k.a. John Iwan Demjanjuk

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John Broadley, Esquire

ON BEHALF OF DHS: Stephen Paskey
Senior Trial Attorney

CHARGE:

Notice: Sec. 237(a)(4)(D), I&N Act [8 U.S.C. § 1227(a)(4)(D)] - Inadmissible at time of entry or adjustment of status under section 212(a)(3)(E)(i), I&N Act [8 U.S.C. § 1182(a)(3)(E)(i)] - Participated in Nazi persecution

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 13 of the Displaced Persons Act (DPA), 62 Stat. at 1013 (1948)

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 10 of the DPA, 62 Stat. at 1013 (1948)

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 13(a) of the Immigration Act of 1924, 43 Stat. 153 (1924)

APPLICATION: Deferral of removal under the Convention Against Torture

By decision dated June 16, 2005, the Immigration Judge denied the respondent's motion to reassign this case to a different Immigration Judge ("CIJ Recusal Dec."). In a separate decision issued on June 16, 2005, the Immigration Judge granted the government's motion for application of collateral estoppel and judgment as a matter of law, and denied the respondent's motion to terminate removal proceedings ("CIJ Collateral Estoppel Dec."). By decision dated December 28, 2005, the Immigration Judge denied the respondent's application for deferral of removal under the Convention Against Torture, and ordered him

removed from the United States to Ukraine, or in the alternative to Germany or Poland ("CIJ Deferral Dec."). On January 23, 2006, the respondent filed a Notice of Appeal ("NOA") with the Board of Immigration Appeals, arguing that the Immigration Judge's decisions were in error.[1] The appeal will be dismissed.

I. BACKGROUND

The respondent is a native of Ukraine who first entered the United States on February 9, 1952, pursuant to an immigrant visa issued under the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 219 ("DPA"). He was naturalized as a citizen of the United States in 1958. Exh. 5B.

On May 19, 1999, the government filed a three-count complaint in the United States District Court for the Northern District of Ohio seeking revocation of the respondent's citizenship. Exh. 5A. Each count alleged that the respondent's naturalization had been illegally procured and must be revoked pursuant to section 340(a) of the Immigration and Nationality Act ("INA" or "the Act"), 8 U.S.C. § 1451(a), because the respondent was not lawfully admitted to the United States as required by section 316 of the Act, 8 U.S.C. § 1427(a). Count I asserted that the respondent was not eligible for a visa because he assisted in Nazi persecution in violation of section 13 of the DPA. Count II asserted that the respondent was not eligible for a visa because he had been a member of a movement hostile to the United States, also in violation of section 13 of the DPA. Count III asserted that the respondent was ineligible for a visa or admission to this country because he procured his visa by willfully misrepresenting material facts.

Following a trial that began on May 29, 2001, the district court ruled in the government's favor on all three counts. Exh. 5B. In doing so, the district court issued separate findings of fact and conclusions of law, and a "Supplemental Opinion" in which the court addressed the respondent's defenses. Exhs. 5B and 5C. The district court found that the respondent served willingly as an armed guard at two Nazi camps in occupied Poland (the Sobibor extermination center and the Majdanek Concentration Camp) and at the Flossenburg Concentration Camp in Germany. Exh. 5B, Findings of Fact ("FOF") 100-05, 123-35, 162-68, 291.

The district court found that Sobibor was created expressly for the purpose of killing Jews, that thousands of Jews were murdered there by asphyxiation with carbon monoxide gas, and that the respondent's actions as a guard there contributed to the process by which these Jews were murdered. Exh. 5B, FOF 128-32. The district court also found that a small number of Jewish prisoners worked as forced laborers at Sobibor, and that the respondent guarded these forced laborers, "compelled them to work, and prevented them from escaping." Exh. 5B, FOF 133-34. The district court found that Jews, Gypsies, and other civilians were confined at Majdanek and Flossenburg because the Nazis considered them to be "undesirable," and that prisoners at both camps were subjected to inhumane treatment, including

[1] We note that the respondent filed an interlocutory appeal regarding the Immigration Judge's June 16, 2005, decision denying his motion asking the Immigration Judge to recuse himself from the case and have it randomly reassigned. In an order dated September 6, 2005, the Board declined to consider the interlocutory appeal and returned the record to the Immigration Court without further action.

forced labor, physical and psychological abuse, and murder. Exh. 5B, FOF 102-03 (Majdanek); 166-67 (Flossenburg). The district court further found that by serving as an armed guard at each camp, the respondent prevented prisoners from escaping. Exh. 5B, FOF 105, 168.

The district court concluded that as a result of this wartime service to Nazi Germany, the respondent was ineligible for the DPA visa under DPA § 13 because (1) he had assisted in Nazi persecution and (2) he had been a member of a movement hostile to the United States. Exh. 5B, Conclusions of Law ("COL") 46, 56. In addition, the district court concluded that the respondent was ineligible for a visa or admission to the United States because he willfully misrepresented his wartime employment and residences when he applied for a DPA visa. Exh. 5B, COL 68.

The district court's factual findings with regard to the respondent's wartime Nazi service rested primarily on a group of seven captured wartime German documents which, according to the court's findings, identified the respondent by, among other things, his name, date of birth, nationality, father's name, mother's name, military history, and physical attributes, including a scar on his back. One of the German documents was a *Dienstausweis*, or Service Identity Card, identifying the holder as guard number 1393 at the Trawniki Training Camp (the "Trawniki card"). In addition to identifying information, the Trawniki card contains a photograph that the court found resembles the respondent and a signature in the Cyrillic alphabet that transliterates to "Demyanyuk." Exh. 5B, FOF 2-19.

In a decision dated April 20, 2004, the United States Court of Appeals for the Sixth Circuit rejected the respondent's claims and affirmed the district court's decision in all respects. *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir. 2004), *cert. denied*, 543 U.S. 970 (2004). On December 17, 2004, the Department of Homeland Security served the respondent with a Notice to Appear ("NTA") charging that he is removable under the above-captioned charges. Michael J. Creppy, who was then the Chief Immigration Judge, assigned the case to himself.[2]

On February 25, 2005, the government filed a motion asking the immigration court to apply collateral estoppel to the findings of fact and conclusions of law in the denaturalization case, and to hold that the respondent is removable as a matter of law on the charges contained in the NTA. Exh. 5. On April 26, 2005, the respondent filed a motion to reassign the case to a randomly-selected judge at the Arlington Immigration Court. Exh. 9.

On June 16, 2005, the Chief Immigration Judge denied the respondent's motion to reassign, granted the government's motion to apply collateral estoppel, and held that the respondent was removable as charged. Exhs. 19 and 20. The Chief Immigration Judge also held that, as an alien who assisted in Nazi persecution, the respondent was barred as a matter of law from all forms of relief from removal other than deferral of removal under the Convention Against Torture. Exh. 20.

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[2] All references in this decision to the "Chief Immigration Judge" are to Michael J. Creppy, who was Chief Immigration Judge at the time of the respondent's removal hearing.

Thereafter, the respondent filed an application for deferral of removal. Exh. 31. On December 28, 2005, the Chief Immigration Judge denied the respondent's application for deferral of removal on the ground that he failed to meet his burden of proving: 1) that he was likely to be prosecuted if removed to Ukraine; 2) that if prosecuted he was likely to be detained; and 3) that if prosecuted and detained, he was likely to be tortured. The Chief Immigration Judge ordered the respondent removed to Ukraine, with alternate orders of removal to Germany or Poland. The respondent filed a timely appeal to the Board of Immigration Appeals.

II. THE CHIEF IMMIGRATION JUDGE'S DECISIONS

A. The Immigration Judge's June 16, 2005, Decision Regarding the Assignment of the Respondent's Case

The Chief Immigration Judge assigned himself to hear the respondent's case. On April 26, 2005, the respondent filed a Motion to Reassign to Arlington Immigration Judge. The respondent raised three issues in support of his motion: 1) that the Chief Immigration Judge lacked the authority to preside over removal proceedings; 2) that the Chief Immigration Judge should recuse himself because a reasonable person would question his impartiality; and 3) that due process requires random reassignment to an Arlington Immigration Court Judge.

In a decision dated June 16, 2005, the Chief Immigration Judge denied the respondent's motion, deciding that 1) he did have the authority to conduct removal proceedings; 2) despite the respondent's allegations to the contrary, recusal was not warranted because a reasonable person, knowing all of the relevant facts, would not reasonably question his impartiality; and 3) due process did not require random Immigration Judge assignment of the respondent's removal proceedings.

B. The Immigration Judge's June 16, 2005, Decision Regarding Collateral Estoppel

On February 21, 2002, the United States District Court for the Northern District of Ohio, Eastern Division, entered judgment revoking the respondent's United States citizenship. *United States v. Demjanjuk*, No. 1:99CV1193, 2002 WL 544622 (N.D. Ohio Feb. 21, 2002) (unpublished decision). The United States Court of Appeals for the Sixth Circuit affirmed this decision on April 30, 2004. *United States v. Demjanjuk*, 367 F.3d 623. On February 12, 2003, the respondent filed a motion for relief pursuant to Fed.R.Civ.P. 60(b). The district court denied the motion on May 1, 2003, and the United States Court of Appeals for the Sixth Circuit affirmed the decision on April 20, 2005. *United States v. Demjanjuk*, 128 Fed. Appx. 496, 2005 WL 910738 (6th Cir. 2005).

On February 25, 2005, the government filed a Motion for the Application of Collateral Estoppel and Judgment as a Matter of Law and a brief in support of the motion. The government contended that each of the factual allegations set forth in the NTA was litigated and decided during the respondent's

denaturalization proceedings and that, with the exception of allegation number 22,[3] those facts were necessary to the judgment in that case. Thus, the government argued that the respondent should be precluded from contesting the issues in removal proceedings. The government also argued that collateral estoppel precluded the respondent from relitigating the legal conclusions in the denaturalization proceeding concerning his eligibility for a DPA visa and the lawfulness of his admission to the United States.

The Immigration Judge found that collateral estoppel did apply to all of the allegations of fact, except number 22, and to the charges contained in the NTA. Specifically, the Immigration Judge found that in the removal proceedings before him, the government sought to remove the respondent based on the same factual and legal issues presented in the denaturalization case. The Immigration Judge went through each allegation of fact at issue, and determined that the court had reached a decision on each one, and that every fact alleged in the NTA (except allegation number 22) was necessary and essential to the district court's judgment revoking the respondent's citizenship. Therefore, the Immigration Judge found that the respondent was collaterally estopped from relitigating the factual and legal issues presented, and that he was removable pursuant to the four charges of removability.

C. The Immigration Judge's December 28, 2005, Decision Regarding Relief from Removal

The Immigration Judge noted that the respondent's application for deferral of removal is based on three underlying premises: 1) prisoners in Ukraine are frequently subjected to serious abuse or torture, 2) persons who are potentially embarrassing to the Ukranian government are at risk of physical harm and death, and 3) he is uniquely at risk of torture if he is removed to Ukraine. The Immigration Judge found that the evidence of record did not support a finding that the respondent would be prosecuted in Ukraine because of his Nazi past. In reaching this decision, the Immigration Judge noted that Ukraine has not charged, indicted, prosecuted, or convicted a single person for war crimes committed in association with the Nazi government of Germany. The Immigration Judge also found that the evidence of record did not support a finding that the respondent would likely be detained while awaiting trial or as a result of conviction. Finally, the Immigration Judge found the respondent's assertion that he would likely be tortured if taken into custody in Ukraine to be speculative and not supported by the record. For these reasons, the Immigration Judge denied the respondent's application for deferral of removal because he found that he had not established that he was more likely than not to be tortured if removed to Ukraine.

III. DISCUSSION

On appeal the respondent argues that: 1) the Chief Immigration Judge has no jurisdiction to conduct removal proceedings; 2) the Chief Immigration Judge improperly refused to recuse himself as required by applicable law; 3) the Chief Immigration Judge improperly refused to assign the respondent's case on a random basis to an Immigration Judge sitting in the Arlington, Virginia Immigration Court with responsibility for cases arising in Cleveland, Ohio; 4) the Chief Immigration Judge erroneously found that certain facts

[3] Allegation 22 in the Notice to Appear reads as follows: "Your continued, paid service for the Germans, spanning more than two years, during which there is no evidence you attempted to desert or seek discharge, was willing."

relevant to the removability issue had been established by collateral estoppel; and 5) the Chief Immigration Judge erroneously found that the respondent was not eligible for deferral of removal pursuant to the Convention Against Torture. Each of these arguments is addressed below.

A. The Power of the Chief Immigration Judge to Conduct Removal Proceedings

The respondent argues that the position of Chief Immigration Judge is purely administrative, i.e., that the regulations do not confer on the Chief Immigration Judge the powers of an Immigration Judge to conduct hearings, and therefore the Chief Immigration Judge was without authority to conduct removal proceedings in this case. We disagree.

The Attorney General has been vested by Congress with the authority to conduct removal proceedings under the INA and to "establish such regulations" and "delegate such authority" as may be needed to conduct such proceedings. *See* section 103(g)(2) of the Act; 8 U.S.C. § 1103(g)(2). In 1983, the Attorney General created the Executive Office for Immigration Review ("EOIR") to carry out this function. 48 Fed. Reg. 8038 (Feb. 25, 1983). The authority of various officials within EOIR, including Immigration Judges and the Chief Immigration Judge, is discussed in the regulations at 8 C.F.R. §§ 1003.1 through 1003.11.

The duties of the Chief Immigration Judge are set forth as follows:

> The Chief Immigration Judge shall be responsible for the general supervision, direction, and scheduling of the Immigration Judges in the conduct of the various programs assigned to them. The Chief Immigration Judge shall be assisted by Deputy Chief Immigration Judges and Assistant Chief Immigration Judges in the performance of his or her duties. These shall include, but are not limited to:
>
> (a) Establishment of operational policies; and
> (b) Evaluation of the performance of Immigration Courts, making appropriate reports and inspections, and taking corrective action where indicated.

8 C.F.R. § 1003.9.

We reject the argument that the regulatory provision which sets forth the duties of the Chief Immigration Judge is a comprehensive grant of authority which precludes him from performing any other duties. The regulation sets forth only some of the specific responsibilities and duties assigned to the Chief Immigration Judge. However, the explicit language of the regulation makes clear that the Chief Immigration Judge's duties are "not limited to" those explicitly referenced in the regulation. Therefore, we must determine if conducting removal proceedings falls within the other duties for which the Chief Immigration Judge is responsible.

Pursuant to 8 C.F.R. § 1003.10, Immigration Judges are authorized to preside over exclusion, deportation, removal, and asylum proceedings and any other proceedings "which the Attorney General may assign them to conduct." "The term *immigration judge* means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service." 8 C.F.R. § 1001.1(l).

The Chief Immigration Judge is an attorney whom the Attorney General appointed as an administrative judge within the Executive Office for Immigration Review. In this context, we note that his position description indicates that the Chief Immigration Judge's "occupational code" is "905," which is the code for attorney. Exh. 19A. The Chief Immigration Judge is also "qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act" as required by the regulation. That he is considered qualified to conduct such proceedings is manifest by the fact that his position description, signed by the director of EOIR, the Attorney General's delegate, explicitly provides that "[w]hen called upon, [the Chief Immigration Judge] performs the duties of an immigration judge in areas such as exclusion proceedings, discretionary relief from deportation, claims of persecution, stays of deportation, recission of adjustment of status, custody determinations, and departure control." Exh. 19A.[4] Because the Chief Immigration Judge is an attorney appointed by the Attorney General's designee (the Director of EOIR) as an administrative judge qualified to conduct removal proceedings under section 240 of the Act, we conclude that he is an Immigration Judge within the meaning of 8 C.F.R. § 1001.1(1), and therefore had the authority to conduct the removal proceedings in this case.[5]

B. Recusal of the Chief Immigration Judge

The respondent argues that the Chief Immigration Judge should have recused himself from hearing this case because a reasonable person, possessed of all relevant facts, might reasonably question his impartiality. Specifically, the respondent asserts that because the Chief Immigration Judge wrote a law review article addressing the treatment of Nazi war criminals under United States immigration law, and

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[4] The position description states that "[w]hen called upon, [the Chief Immigration Judge] performs the duties" of an Immigration Judge. However, there is no statutory or regulatory authority requiring a higher authority in EOIR or the Department of Justice to "call upon" the Chief Immigration Judge to act as an Immigration Judge before he has the authority to do so. Therefore, we reject the respondent's suggestion that the authority of the Chief Immigration Judge is limited based on the language in the position description. Instead, the language of the position description simply acknowledges the reality that the Chief Immigration Judge may occasionally be "called upon" to "perform[] the duties" of an Immigration Judge by workload and other considerations.

[5] We note that the Board of Immigration Appeals and the United States Court of Appeals for the Sixth Circuit have both affirmed a decision in which the Chief Immigration Judge performed the duties of an Immigration Judge. *Matter of Ferdinand Hammer*, File A08-865-516 (BIA Oct. 13, 1998), *aff'd. Hammer v. INS*, 195 F.3d 836 (6th Cir. 1999), *cert. denied*, 528 U.S. 1191 (2000).

because two of the three cases he heard over a period of many years dealt with this issue, the Chief Immigration Judge's decision to appoint himself to hear this case raises serious concerns about his impartiality.

In a 1998 law review article, the Chief Immigration Judge addressed the treatment of Nazi war criminals under United States immigration law. *See* Michael J. Creppy, *Nazi War Criminals in Immigration Law*, 12 Geo. Immigr. L.J. 443 (1998). The article attempts, by its own terms, to be a "comprehensive presentation" on the law relating to the removal of persons who assisted in Nazi persecution. The first ten pages are devoted to "historical development" of the law in this area. In this section of the article the Chief Immigration Judge noted that "it is believed that a high number of suspected Nazi War Criminals illegally entered the United States under" the Displaced Persons Act of 1948. *Id.* at 447. The DPA is the provision of law under which the respondent entered this country in 1951.

The next fourteen pages of the law review article discuss the investigation, apprehension, and attempted removal of persons who allegedly assisted in Nazi persecution, including a detailed and objective discussion of the removal process. *Id.* at 453-67. The final three paragraphs – less than one published page in the article – discuss the Chief Immigration Judge's opinions "on the future of this area of immigration law." Those paragraphs read, in their entirety:

> A. Time Issue
>
> The issue of Nazi War Criminals in immigration law will eventually subside. This is not because of a lack of interest, rather it is a reflection of the challenge we face every day – the passage of time. It has been nearly 52 years since World War II ended. If a person had been 18 years old at the time the war ended, he would be 70 years old today. This "biological solution" as it has been called, effects [sic] not just the ability to find the Nazi War Criminals alive and in sufficient health to stand trial, but also it challenges the government's ability to find witnesses to testify to the atrocities. It is a simple fact that time will resolve the problem.
>
> B. A Change in Scope or Focus
>
> Where will this leave this area of immigration law? The author believes the focus of the government efforts will or should turn to targeting the removal of other war crime criminals believed to have committed similar atrocities. For example, in the last few years we have seen the devastation that has occurred in areas such as Bosnia, Somalia, Rwanda and Liberia.
>
> The IMMACT 90 included a revision to our Immigration laws, in section 212(a)(2)(E)(ii), which mandates that aliens who have committed genocide not be admitted into the United States. Regrettably, it is quite possible that some of the perpetrators of these crimes against humanity have reached or may reach safe harbor within U.S. borders. With the

> emphasis on removing Nazi war criminals diminishing as a natural effect of time, the government may seek to renew its efforts by ferreting this new crop of war criminals. It is a sad testimony to humanity that as a society we continue to generate war criminals. As long as we persist in taking action against them, we continue to triumph over them.

Id. at 467.

The respondent argues that the Chief Immigration Judge's personal views on the need for aggressive prosecution of suspected Nazi war criminals under U.S. immigration law betrays an improper bias. Respondent's Br. at 18. Specifically, the respondent argues that "the Chief Immigration Judge's opinion that those suspected of having committed war crimes and 'similar atrocities' should be 'targeted for removal,' reveals a lack of impartiality towards aliens – such as the respondent – who have been placed in removal proceedings and charged with participation in Nazi persecution or genocide under the INA." Respondent's Br. at 18. We disagree.

The standard for recusal of an Immigration Judge is whether "it would appear to a reasonable person, knowing all the relevant facts, that the judge's impartiality might reasonably be questioned." Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum 05-02: *Procedures For Issuing Recusal Orders in Immigration Proceedings* ("Recusal Memo"), published in 82 Interp. Rel. 535 (Mar. 28, 2005). The Board has declared that recusal is warranted where: 1) an alien demonstrates that he was denied a constitutionally fair proceeding; 2) the Immigration Judge has a personal bias stemming from an extrajudicial source; or 3) the Immigration Judge's conduct demonstrates "pervasive bias and prejudice." *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982).

In total, the respondent's claims of bias are premised on fewer than a half dozen sentences in a 25-page article. We note that the Chief Immigration Judge did not make any comment that would appear to commit him to a particular course of action or outcome in this or any other case. In fact, he did not specifically mention the respondent and he made no statement indicating any personal bias or animosity toward the respondent or any other identifiable individual. Instead, he emphasized that the respondents in Holtzman Amendment cases are entitled to due process protections such as an evidentiary hearing and both administrative and judicial review, and that the government has the burden of proving its allegations by clear and convincing evidence. *See* 12 Geo. Immigr. L. J. at 464.

We find that the Chief Immigration Judge's law review article expressed nothing more than a bias in favor of upholding the law as enacted by Congress, which is not a sufficient basis for recusal. *See Buell v. Mitchell*, 274 F.3d 337, 345 (6th Cir. 2001) (noting that "[i]t is well-established that a judge's expressed intention to uphold the law, or to impose severe punishment within the limits of the law upon those found guilty of a particular offense," is not a sufficient basis for recusal); *United States v. Cooley*, 1 F.3d 985, 993 n.4 (10th Cir. 1993) ("Judges take an oath to uphold the law; they are expected to disfavor its violation."); *Smith v. Danyo*, 585 F.2d 83, 87 (3rd Cir. 1978) (noting that "there is a world of difference between a charge of bias against a party . . . and a bias in favor of a particular legal principle"); *Baskin v. Brown*, 174 F.2d 391, 394 (4th Cir. 1949) ("A judge cannot be disqualified merely

because he believes in upholding the law, even though he says so with vehemence."). Moreover, we find no instances of a federal judge having been recused under circumstances similar to this case, i.e., where he or she made general statements about an area of law. *Compare, e.g., United States v. Cooley*, *supra*, at 995 (recusal required where judge appeared on "Nightline" and expressed strong views about a pending case); *United States v. Microsoft Corp.*, 253 F.3d 34, 109-15 (D.C. Cir. 2001) (district court judge created an appearance of impropriety by making "crude" comments to the press about Bill Gates and other Microsoft officials); *Roberts v. Bailar*, 625 F.2d 125, 127-30 (6th Cir. 1980) (disqualification required in employment discrimination suit against post office, where judge stated during a pre-trial hearing: "I know [the Postmaster] and he is an honorable man and I know he would never intentionally discriminate against anybody.").

We also note that the standard for recusal can only be met by a showing of actual bias. *See Harlin v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir. 1998) (administrative judge enjoys "a presumption of honesty and integrity" which may be rebutted only by a showing of actual bias); *Del Vecchio v. Illinois Dep't of Corr.*, 31 F.3d 1363, 1371-73 (7th Cir. 1994) (en banc) (absent a financial interest or other clear motive for bias, "bad appearances alone" do not require disqualification of a judge on due process grounds). Nothing in the Chief Immigration Judge's decisions or the record establishes that the Chief Immigration Judge was actually biased against the respondent, nor does the respondent point to any error in the decisions which allegedly resulted from bias.

We also reject the respondent's argument regarding the alleged appearance of impropriety based on the fact that although the Chief Immigration Judge presided over only three removal cases from 1996 to 2006, two of those cases involved aliens who allegedly assisted in Nazi persecution. The respondent argues that the Chief Immigration Judge has "exhibited an unmistakable interest" in Holtzman Amendment cases by writing a law review article about such cases and presiding over such cases during a ten-year period when he heard a total of three cases. Respondent's Br. at 19-20. The respondent speculates that this interest shows "a decided lack of judicial impartiality, if not outright bias," and that by presiding over this case the Chief Immigration Judge is attempting to "dictate" the outcome of this proceeding. Respondent's Br. at 20, 23. We disagree.

A judge is not precluded from taking a special interest in a certain area of law, and the fact that a judge has done so does not imply that the judge cannot fairly adjudicate such cases. *See e.g., United States v. Thompson*, 483 F.2d 527, 529 (3rd Cir. 1973) (bias in favor of a legal principle does not necessarily indicate bias against a party). Moreover, federal courts have recognized that a departure from random assignment of judges, including the assignment of a case to the Chief Judge, is permissible when a case is expected to be protracted and presents issues that are complex or of great public interest. For example, in *Matter of Charge of Judicial Misconduct or Disability*, 196 F.3d 1285, 1289 (D.C. Cir. 1999), the D.C. Circuit upheld a local rule permitting the Chief Judge to depart from the random assignment of cases if he concluded that the case will be protracted and a non-random assignment was necessary for the "expeditious and efficient disposition of the court's business." The appeals court further recognized that it was permissible for the Chief Judge to assign such cases to judges who were "known to be efficient" and who had sufficient time in their dockets to "permit the intense preparation required by these high profile cases." Id. at 1290.

We note that Holtzman Amendment cases are generally complicated and require preparation of lengthy written decisions. In contrast, most decisions by Immigration Judges in removal proceedings are decided in an oral opinion issued from the bench immediately after the evidence has been presented.[6] The Chief Immigration Judge had previously presided over a Holtzman Amendment case, had published an article in that area of law, and was not burdened with an overcrowded docket. For these reasons, we find that it was reasonable for the Chief Immigration Judge to assign the case to himself, i.e., he had the time necessary to conduct this case and the expertise needed to handle it in a fair, impartial, and efficient manner. Thus, we conclude that an objectively reasonable person would not regard the Chief Immigration Judge's assignment of this case to himself as a reason to question his impartiality. Rather, such a person would likely conclude that the assignment was both reasonable and justified.

After reviewing the record, we find that a reasonable person knowing all the facts of this case would not question the Chief Immigration Judge's impartiality. Moreover, the respondent has not shown that he was denied a constitutionally fair proceeding, that the Immigration Judge had a personal bias against him stemming from an extrajudicial source, or that the Chief Immigration Judge's conduct demonstrated a pervasive bias and prejudice against him. For all of these reasons, we conclude that the Chief Immigration Judge was not required to recuse himself from the respondent's removal proceedings.

C. Assignment of the Respondent's Case on a Random Basis

The respondent argues that the Chief Immigration Judge should have assigned the respondent's case to an Arlington Immigration Judge on a random basis. Specifically, citing to 8 C.F.R. § 1003.10, the respondent argues that by singling out the respondent's case and imposing himself as arbiter of his removal proceedings, rather than allowing the case to be assigned to an Immigration Judge on a random basis according to the method routinely employed by the Arlington Immigration Court, he sidestepped the proper regulatory procedures. The respondent asserts that the Chief Immigration Judge's actions raise such serious due process concerns that the respondent was deprived of a fair hearing.

In support of his argument, the respondent points to cases which note that one tool to help ensure fairness and impartiality in judicial proceedings is the assignment of cases to available judges on a random basis. *See Beatty v. Chesapeake Ctr., Inc.*, 835 F.2d 71, 75 n.1 (4th Cir. 1987) (Murnaghan, C.J., concurring) ("One of the court's techniques for promoting justice is randomly to select panel members to hear cases."). However, the respondent has pointed to no statute, regulation, or case law which affirmatively requires the random assignment of an Immigration Judge in removal proceedings, or which strips the Chief Immigration Judge of the authority to assign a specific case. Indeed, at least one federal court has expressly concluded that random assignment is not required to satisfy the standard of impartiality, stating that "[a]lthough random assignment is an important innovation in the judiciary, facilitated greatly by the presence of computers, it is not a necessary component to a judge's impartiality. *Obert v. Republic W. Ins.*, 190 F.Supp.2d 279, 290-91 (D.R.I. 2002). Moreover, the respondent himself acknowledges that random assignment is not "mandatory, but that it is appropriate given the history and circumstances of this unique case." Respondent's Br. at 25. As discussed above, the Chief Immigration Judge had previously presided over a Holtzman Amendment case, had published an article in that area of

[6] The Chief Immigration Judge issued three separate written decisions in this case.

law, and was not burdened with an overcrowded docket. For these reasons, and because there is no authority mandating the random assignment of the respondent's removal proceedings, we reject the respondent's argument on this point.

D. Establishing Facts Relating to Removability by Collateral Estoppel

The respondent next argues that the Chief Immigration Judge improperly applied the doctrine of collateral estoppel. In his June 16, 2005, decision, the Chief Immigration Judge applied collateral estoppel with respect to all but one of the allegations in the NTA. The respondent argues that collateral estoppel cannot be applied to the present case because the respondent did not have a full and fair opportunity to litigate the issues on which the Chief Immigration Judge granted the government's collateral estoppel motion. We disagree.

The doctrine of collateral estoppel, or issue preclusion, provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Hammer v. INS*, 195 F.3d 836, 840 (6th Cir. 1999), *quoting Montana v. United States*, 440 U.S. 147, 153 (1979). In a case involving the Board of Immigration Appeals, the United States Court of Appeals for the Sixth Circuit decided that the doctrine of collateral estoppel applies only when 1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation; 2) the issue was actually litigated and decided in the prior action; 3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation; 4) the party to be estopped was a party to the prior litigation (or in privity with such a party); and 5) the party to be estopped had a full and fair opportunity to litigate the issue. *Id.* at 840 (citations omitted); *see also Matter of Fedorenko*, 19 I&N Dec. 57, 67 (BIA 1984) (holding that an alien's prior denaturalization proceedings conclusively established the "ultimate facts" of a subsequent deportation proceeding, so long as the issues in the prior suit and the deportation proceeding arose from "virtually identical facts" and there had been "no change in the controlling law.").

1. The Respondent's Collateral Estoppel Argument Regarding the Trawniki Card

The respondent's first collateral estoppel argument centers around the signature on the German *Dienstauswets*, or Service Identity Card, identifying the holder as guard number 1393 at the Trawniki Training Camp. The Trawniki card also identifies the holder by name, date of birth, and other information, and contains a signature in the Cyrillic alphabet that transliterates to "Demyanyuk." Exh. 5B, FOF 2-19.

In each trial the respondent argued, unsuccessfully, that the Trawniki card did not refer to him. In 1987 the respondent faced a criminal trial in Israel. During that trial, the respondent offered the testimony of Dr. Julius Grant, a forensic document examiner who claimed that the signature on the Trawniki card was not made by the respondent. In response, the Israeli government elicited testimony from Dr. Gideon Epstein, the retired head of the Forensic Document Laboratory at the former Immigration and Naturalization Service. In his testimony, Dr. Epstein rejected Dr. Grant's conclusions regarding the signature on the Trawniki card, pointing out specific flaws in his testimony. See Exh. 17M. The respondent's attorney cross-examined Dr. Epstein, but did not question him about his critique of Dr. Grant's testimony. The Israeli court rejected Dr. Grant's conclusions regarding the Trawniki card. Exh. 17G at 95-96.

In rejecting the respondent's claim that he was not the person named on the Trawniki card, the denaturalization court found that Dr. Grant's testimony in Israel was "not reliable or credible" and cited a portion of Dr. Epstein's testimony. Exh. 5B, FOF 22. The respondent subsequently filed a series of post-trial motions and an initial brief in support of his appeal to the United States Court of Appeals for the Sixth Circuit, none of which mention his present allegation that Dr. Epstein testified falsely and that the district court improperly relied on the testimony of Dr. Epstein in disregarding Dr. Grant's testimony.

The respondent first raised the issue of Dr. Epstein's allegedly false testimony in a reply brief filed during the pendency of his appeal to the United States Court of Appeals for the Sixth Circuit. Respondent's Br. at 30. The Sixth Circuit refused to consider the issue and granted the government's motion to strike his reply brief on the ground that issues raised for the first time on appeal are beyond the scope of the court's review. *See* 367 F.3d at 638. The Sixth Circuit also commented on the lack of evidence or legal support offered with respect to the respondent's arguments regarding Dr. Epstein's testimony. Specifically, the Court noted that the respondent "cannot raise allegations in the eleventh hour, without evidentiary or legal support, as "'issues adverted to [on appeal] in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived ....'" *Demjanjuk* 367, F.3d at 638 (citations omitted).

We reject the respondent's argument that he did not have a fair opportunity to litigate his claims regarding the Trawniki card. The respondent knew (or should have known) all pertinent facts at the completion of Dr. Epstein's direct examination. However, he did not raise any objection concerning Dr. Epstein's testimony during cross-examination, nor did he object to this testimony in his first post-trial motions. Even when the respondent appealed his case to the United States Court of Appeals for the Sixth Circuit he failed to question the testimony of Dr. Epstein in his initial brief. It was only in a reply brief that he finally raised this issue. At that late point in the proceedings, and given what the Sixth Circuit found to be a dearth of evidentiary or legal support, the Court found that the respondent had waived his opportunity to raise a new argument and granted the government's motion to strike his brief.

Collateral estoppel requires only that a party had a full and fair *opportunity* to litigate relevant issues during the earlier proceeding. A litigant cannot avoid collateral estopped if, solely through the litigant's own fault, an issue was not raised or evidence was not presented. *See generally, N. Georgia Elec. Membership Corp.*, 989 F.2d 429, 438 (11th Cir. 1993); *Blonder-Tongue Laboratories*, 402 U.S. 313, 333 (1971) (collateral estoppel does not apply if the litigant, through no fault of his own, is deprived of crucial evidence or witnesses). In the present case, the respondent was not prevented from raising his concerns about Dr. Epstein during the denaturalization case—rather, he simply failed to do so until it was too late. *See Demjanjuk* 367, F.3d at 638 (citations omitted); *see also United States v. Crozier*, 259 F.3d 503, at 517 (6th Cir. 2001) (citations omitted) (noting that the Sixth Circuit generally will not hear issues raised for the first time in a reply brief). Because the respondent had a fair opportunity to litigate his claims about Dr. Epstein's testimony but did not do so, he waived those claims in the denaturalization case and is barred from raising them here.

2. The Respondent's Collateral Estoppel Argument Regarding Certain Documents

The respondent's second collateral estoppel argument centers around the difficulty he experienced obtaining certain documents in his denaturalization proceedings. He argues that the government's case against him was founded on documents, most of which had been supplied to the government by the former Soviet Union or by states formed from the former Soviet Union, and that his ability to obtain other documents from the files from which the government's documents came was limited or non-existent. He argues that he relied on the U.S. Government to help him retrieve documents held by the government of Ukraine, and the failure of the U.S. government to aggressively pursue these documents "effectively denied [him] a fair opportunity to litigate his case." Respondent's Br. at 36. We disagree.

The respondent first learned of the existence of a KGB investigative file that contained materials pertaining to him, i.e., Operational Search File No. 1627 ("File 1627"), in May of 2001. On May 14, 2001, the respondent filed an emergency motion for continuance of the trial date in which he alleged "discovery abuse" by the government. Exh. 5G, docket entry 109. Two days later, he filed a supplemental brief in support of that motion, in which he raised issues about the contents of File 1627. Id. docket entry 110.

On May 21, 2001, the respondent filed a second emergency motion seeking to conduct additional discovery relating to File 1627. Exh. 5G, docket entry 112; NOA Attachment D. The respondent sought to depose both U.S. and Ukranian officials, and to obtain the contents of any investigative files in the possession of Ukranian authorities relating to the respondent or his cousin, Ivan Andreevich Demjanjuk, "if necessary with the assistance of the United States government." NOA Attachment D. On May 22, 2001, the district court denied the respondent's motion to continue the trial date, but granted his motion for discovery in part and permitted him to seek the investigative files. NOA Attachment E.

Two days later, at the respondent's request, the Director of the Justice Department's Office of Special Investigations ("OSI") sent a letter to Ukranian authorities making what he termed a "very urgent request" for "copies of the complete contents" of File 1627. NOA Attachment F. The letter requested that Ukranian authorities advise OSI "tomorrow" as to whether File 1627 had been found and was being copied, and when the copies could be expected at the U.S. Embassy in Kiev. *Id.* The letter notes that the Director of OSI telephoned the Ukranian Embassy in Washington and personally discussed the matter with Ukranian officials shortly before the letter was faxed to the embassy. *Id.*

Despite the urgent nature of OSI's request, the Ukranian Government did not respond for more than 2 months. In a letter dated July 27, 2001, a Ukranian official informed the U.S. government that "[i]n the Directorate of the Security Service in Vinnytsya Oblast there is in fact an Operational Search File No. 1627, which deals with the course of the investigative work pertaining to I.M. Demyahyuk." NOA Attachment G. The letter made no reference to the availability of copies or other access to the contents of the file. Instead, the letter indicated that some 585 pages of material had been sent to Moscow in 1979. *Id.* The U.S. government submitted a copy of this letter to the respondent and to the court, together with a complete English translation and a cover letter on August 17, 2001 – after the trial but some 6 months before the district court rendered a judgment against the respondent. *Id.* There is no evidence that the

respondent thereafter attempted to obtain copies of this material or that he sought to have the U.S. government assist in obtaining such copies.

On February 21, 2002, 6 months after the respondent received a copy of the July 27, 2001, letter from a Ukranian official, the district court entered a judgment revoking the respondent's naturalized U.S. citizenship. On March 1, 2002, the respondent filed a comprehensive post-judgment motion asking the court to amend its findings, alter or amend the judgment, grant a new trial, and/or grant relief under Fed. R. Civ. P. 60(b). Exh. 5G, docket entry 171. At that time, the respondent was fully aware of the U.S. government's efforts to obtain File 1627 and the Ukranian government's response, and he had no reason to believe that the government had made further efforts to obtain the file. In this motion the respondent did not raise the issue of the government's efforts to obtain File 1627.

The respondent filed an appeal from the denaturalization judgment with the United States Court of Appeals for the Sixth Circuit on May 10, 2002. Again, he did not raise any issue relating to File 1627 in either his initial brief or his reply brief. On February 12, 2003, the respondent filed a second post-judgment motion pursuant to Fed. R. Civ. P. 60(b), and again did not raise any issue with respect to File 1627. His motion was denied by the district court, and his appeal from that decision was dismissed. Exh. 17O.

The respondent's removal proceedings were commenced in December 2004. On February 25, 2005, the government moved to apply collateral estoppel to the findings and conclusions in the denaturalization case. The respondent did not raise any issue relating to File 1627 in his brief opposing the government's motion, and the Chief Immigration Judge granted the motion on June 16, 2005. Exh. 14.

While there is no provision for discovery in the course of removal proceedings, the Government voluntarily provided various documents on July 22, 2005, at the respondent's request. One such document was a May 31, 2001, e-mail from Evgeniy Suborov, an employee of the U.S. Embassy in Ukraine, to Dr. Steven Coe, a government staff historian. NOA Attachment I ("the Suborov e-mail"). The Suborov e-mail states that File 1627 contained a large number of pages (585 of which apparently had been sent to Moscow). Despite receiving the Suborov e-mail on July 22, 2005 – some 5 months before the Chief Immigration Judge entered his final order, the respondent did not request that the Chief Immigration Judge reconsider his decision granting collateral estoppel, nor did he raise any issue relating to File 1627 before the Chief Immigration Judge in any other context. On January 23, 2006, the respondent filed a Notice of Appeal with the Board, in which he raised his claims regarding File 1627 for the first time in the course of his removal proceedings.

It is well-established that appellate bodies ordinarily will not consider issues that are raised for the first time on appeal. *E.g., Am. Trim L.L.C. v. Oracle Corp.*, 383 F.3d 462, 477 (6th Cir. 2004) (citations omitted) (noting that the appeals court would not consider an argument raised for the first time in a reply brief). Consistent with regulatory limits on the Board's appellate jurisdiction, the Board has applied this rule to legal arguments that were not raised before the Immigration Judge. *Matter of Rocha*, 20 I&N Dec. 944, 948 (BIA 1995) (citations omitted) (INS waived issue by failing to make timely objection). *See also* 8 C.F.R. § 1003.1(b)(3) (Board's appellate jurisdiction in removal cases is limited to review of decisions by an Immigration Judge). In addition, the Board "will not engage in fact finding in the course of deciding

appeals," 8 C.F.R. § 1003.1(d)(iv), and a party may not "supplement" the record on appeal. *Matter of Fedorenko*, *supra* at 73-74.

Despite having a full and fair opportunity to pursue his concerns regarding File 1627 during his denaturalization proceedings, the respondent elected not to raise any issues relating to File 1627 in his first post-trial motion, his direct appeal, and his subsequent motion for relief from judgment. Moreover, although the respondent filed numerous pleadings with the Chief Immigration Judge and appeared before him on two occasions, he never: 1) mentioned File 1627; 2) made his own efforts to examine or obtain a copy of the file; or 3) claimed that collateral estoppel should be denied for reasons relating to the file. For these reasons, we find no error in the Chief Immigration Judge's decision to apply collateral estoppel in this case, and we reject the respondent's argument that he was denied a fair opportunity to litigate his case. Because he did have the opportunity to raise his claims regarding File 1627 below, we conclude that those claims have been waived and we will not consider them now for the first time on appeal.

We reject the respondent's claim that he could not have raised the issue of File 1627 earlier and that "new information" came to light after the Chief Immigration Judge granted the government's motion for collateral estoppel in June 2005. As of August 17, 2001, the respondent was aware that File 1627 contained a large number of pages, only a few of which had been provided to the U.S. Government. He was also fully aware of the U.S. Government's written and telephonic efforts to obtain a complete copy of the file for him and the Ukranian government's response. Therefore, the documents the respondent seeks to rely on as "new information" (Respondent's Br. tabs J, K and L) simply confirm what the respondent knew or should have known long before his citizenship was revoked and the removal case began. For all of these reasons, we agree with the Chief Immigration Judge's conclusion that the facts established in the denaturalization case are conclusively established in his removal proceedings (thereby rendering the respondent removable as charged) by operation of the doctrine of collateral estoppel.

E. Deferral of Removal under the Convention Against Torture

Finally, the respondent argues that the Chief Immigration Judge erred in denying his application for deferral of removal under the Convention Against Torture. A person seeking deferral of removal must prove that it is more likely than not that he or she would be tortured if removed to a particular country. 8 C.F.R. §§ 208.16(c)(2) and 208.17(a). It is not sufficient for an applicant to claim a subjective fear of torture, rather, the applicant must prove, through objective evidence, that he or she is likely to be tortured in a particular country. *Matter of J-E-*, 23 I&N Dec. 291, 302 (BIA 2002). For purposes of the Convention Against Torture, "torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for a specific purpose, such as extracting a confession or punishing the victim. 8 C.F.R. § 208.18(a)(1). To qualify as torture, the act must also be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," at a time when the victim is in the offender's "custody or physical control." 8 C.F.R. §§ 208.18(a)(1) and (6). "Torture is an extreme form of cruel and inhumane treatment and does not include lesser forms of cruel, inhumane, or degrading treatment or punishment. . . ." 8 C.F.R. § 208.18(a)(2). Moreover, "[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture." 8 C.F.R. § 208.18(a)(5).

The thrust of the respondent's claim for deferral is that: 1) the United States Government created a widespread public perception that he is responsible for crimes committed against Jewish prisoners by "Ivan the Terrible" at the Treblinka death camp; 2) the United States will encourage Ukraine to arrest, detain, and prosecute him if he is removed to Ukraine; 3) it is "irrational" to believe that the Ukrainian government will not comply with such requests; 4) many prisoners in Ukraine are subjected to mistreatment and/or torture; and 5) the respondent is especially "vulnerable" to mistreatment and torture because of his age. In denying the respondent's application, the Chief Immigration Judge concluded that the respondent failed to prove three key facts: 1) that as a result of the government's previous assertion that he was "Ivan the Terrible" (an assertion that the government has not made in more than a decade), he is likely to be prosecuted if removed to Ukraine; 2) that if prosecuted, he is likely to be detained; and 3) that if prosecuted and detained, he is likely to be tortured.

The Chief Immigration Judge relied on numerous exhibits showing that Ukraine has not charged, indicted, prosecuted, or convicted a single person for war crimes committed in association with the Nazi government of Germany, despite having numerous opportunities to do so. CIJ Deferral Dec. at 10 (citing Exhibits 35 at 1-2, 36, 37A at 15-22, 37C, 37G, 37H). Moreover, we note that the respondent stipulated that several Ukranian nationals who assisted in Nazi persecution had not been indicted or prosecuted, nor had Ukraine requested their extradition, despite the U.S. government's efforts to encourage Ukraine to do so. Exh. 35 §§ 1-20. We reject the respondent's speculation that because of his notoriety , his case is markedly different from others who have been returned to Ukraine. Instead, the State Department's advisory opinion letter[7] rebuts this claim by expressing the opposite opinion: that the government of Ukraine is "very unlikely" to mistreat a "high-profile individual[]" such as the respondent. Exhs. 39A and 45. For these reasons, and given the absence of *any* evidence of a Nazi war criminal facing prosecution in Ukraine, the respondent's speculative argument is not persuasive. Therefore, we agree with the Chief Immigration Judge that the respondent failed to establish that he is likely to be prosecuted if removed to Ukraine.

We also agree with the Chief Immigration Judge's finding that the respondent has not established that he is likely to be detained even in the unlikely event that he is prosecuted in Ukraine. As set forth in the stipulations between the parties, Ukranian law allows for pre-trial release of criminal defendants, and large numbers of Ukranian criminal defendants are released from custody while awaiting trial. CIJ Deferral Dec. at 11 (citing Exh. 35).

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[7] We reject the respondent's argument that the State Department's advisory opinion is inadmissible. In this regard, we note that the Federal Rules of Evidence do not apply in immigration court proceedings. Because the letter from the State Department is probative and its use is not unfair to the respondent, we find no error in the Chief Immigration Judge's consideration of the letter. *See Matter of K-S-*, 20 I&N Dec. 715, 722 (BIA 1993) (relying on State department advisory opinion letter as "expert" evidence); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999) (noting that the test for admissibility of evidence is whether the evidence is probative and whether its use is fundamentally fair so as to not deprive the alien of due process); 8 C.F.R. §§ 1208.11(a) and (b) (the State Department may provide an assessment of the accuracy of an applicant's claims, information about the treatment of similarly-situated persons or "[s]uch other information as it deems relevant").

Finally, we agree with the Chief Immigration Judge's finding that although conditions in Ukranian prisons may be harsh, it is unlikely that the respondent would be tortured if detained. In this context we note that the evidence of record indicates that the government of Ukraine has permitted international monitoring of its prisons and has engaged in improvement efforts. CIJ Deferral Dec. at 12 (citing Exhs. 39A and 45). Moreover, we note that even if the respondent were to face harsh prison conditions in the unlikely event that he faces detention, generally harsh prison conditions do not constitute torture. *See Matter of J-E-*, 23 I&N Dec. at 301-04; *see generally, Alemu v. Gonzales*, 403 F.3d 572, 576 (8th Cir. 2005) (noting that substandard prison conditions are not a basis for relief under the Convention Against Torture unless they are intentionally and deliberately created and maintained in order to inflict torture); *Auguste v. Ridge*, 395 F.3d 123, 152-53 (3rd Cir. 2005).

Based on our review of the evidence of record, we conclude that the findings of the Chief Immigration Judge are reasonable and permissible conclusions to draw from the record and that none of the findings is clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). Simply put, the respondent's arguments regarding the likelihood of torture are speculative and not based on evidence in the record. *See Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006) (applicant fails to carry burden of proof if evidence is speculative or inconclusive). Therefore, we reject the respondent's arguments, and conclude that the Chief Immigration Judge correctly decided that the respondent failed to prove that he is likely to be prosecuted in Ukraine; that if prosecuted, he is likely to be detained either prior to trial or as a result of a conviction; and, that if prosecuted and detained, he is more likely than not to be tortured.

IV. CONCLUSION

After reviewing the record, we find no error in the Chief Immigration Judge's three decisions from which the respondent appeals. We conclude that the Chief Immigration Judge correctly found that the respondent is removable as charged and ineligible for any form of relief from removal. Moreover, we reject the arguments raised by the respondent on appeal. For these reasons, the following order shall be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

ATTACHMENT NO. 2

DENIAL OF ADMINISTRATIVE STAY OF REMOVAL

Office of Detention and Removal Operations
Cleveland, Ohio
U.S. Department of Homeland Security
1240 E. 9th Street, Room 535
Cleveland, OH 44199

U.S. Immigration and Customs Enforcement

April 3, 2009

John H. Broadley, Esq.
John H. Broadley & Associates, P.C.
Canal Square
1054 Thirty-First St., N.W.
Washington D.C. 20007

Re: John Demjanjuk, A08 237 417

Dear Mr. Broadley:

This letter is in response to your client's, Mr. John Demjanjuk, A08 237 417, submission of ICE Form I-246, Application for a Stay of Deportation or Removal (Application), [1] with U.S. Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO), on April 1, 2009. The Application requests that ICE stay Mr. Demjanjuk's removal from the United States for one year because it "would not be 'practicable or proper'" under 8 C.F.R. § 241.6 due to his current medical condition. He further claims "urgent humanitarian reasons" under 8 C.F.R. § 212.5 in support of his Application on the ground that his removal, followed by the Federal Republic of Germany (FRG)'s arrest, detention, and confinement pending trial, would be "such stressful events" that would amount to "inhuman and degrading treatment to myself and my family."

As you are aware, Mr. Demjanjuk has exhausted his administrative and judicial remedies to review his removal from the United States under INA § 237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D) (inadmissible at time of entry or adjustment of status under INA § 212(a)(3)(E)(i), 8 U.S.C. § 1182(a)(3)(E)(i) (participated in Nazi persecution); INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (inadmissible at time of entry or adjustment of status under §§ 10 and 13 of the Displaced Persons Act, 62 Stat. at 1013 (1948)); and INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (inadmissible at time of entry or adjustment of status under § 13(a) of the Immigration Act of 1924, 43 Stat. 153 (1924)). He therefore became subject to removal to Ukraine, Poland, or the FRG. See INA § 241(a), 8 U.S.C. § 1231(a). The FRG has agreed to accept him and on March 10, 2009, issued an arrest warrant for him, alleging that he was an accessory to 29,000 counts of murder as a guard at the Sobibor extermination camp from March to September 1943.

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[1] Your March 31, 2009 cover letter requests that ICE waive the requirements that Mr. Demjanjuk file his Application in person and pay the $155 filing fee. Please be advised that the INA regulations prescribe that an applicant "seeking a fee waiver must file his or her affidavit, or unsworn declaration made pursuant to 28 U.S.C. 1746, asking for permission to prosecute without payment of fee of the application, . . . and stating that he or she is entitled to or deserving of the benefit requested and the reasons for his or her inability to pay." 8 C.F.R. § 103.7(c)(1). Although your client has not substantiated his inability to pay the fee, the agency agrees to waive his appearance and the prescribed remittance.

On April 2, 2009, an ICE Division of Immigration Health Services (DIHS) physician conducted a physical examination and concluded that Mr. Demjanjuk is medically stable to travel from the United States to the FRG. A DIHS physician and nurse will be available to assist him during the flight. Medical personnel will monitor his medical condition while en route from Cleveland, Ohio, to Munich, FRG.

In summary, after reviewing Mr. Demjanjuk's Application and DIHS's assessment of his ability to travel in light of the factors enumerated in 8 C.F.R. § 212.5 and INA § 241(c)(2)(A), 8 U.S.C. § 1231(c)(2)(A), I have concluded that your client can safely fly from the United States to the FRG. Accordingly, his Application is denied and no stay of removal will be granted. Please note that a denial of a request for a stay is not subject to administrative or judicial review. 8 C.F.R. § 241.6(b) ("[denial . . . of a request for a stay is not appealable"); Moussa v. Jenifer, 389 F.3d 550, 555 (6th Cir. 2004) (field office director's discretionary decision "is thus unreviewable by [the Court of Appeals.]"). Please contact Supervisory Detention and Deportation Officer Charles Winner at (216) 535-0364 if you have any further questions.

Sincerely,

Vincent Clausen
Field Office Director

cc: John Demjanjuk

ATTACHMENT NO. 3

NEW YORK TIMES 2/5/88 ARTICLE ON JACOB TANNENBAUM

A Jew Who Beat Jews in a Nazi Camp Is Stripped of His Citizenship

By ROBERT D. McFADDEN
Published: Friday, February 5, 1988

A Polish-born Jew accused of wartime atrocities surrendered his United States citizenship before a Federal judge in Brooklyn yesterday and admitted that he brutalized Jewish prisoners in a Nazi forced-labor camp and later entered this country illegally.

But under an agreement with the Justice Department, the 77-year-old Brooklyn resident, Jacob Tannenbaum, will not be deported - an action the Government had sought for a year - because doctors for both sides agreed that his age and failing health would make it life-threatening.

Mr. Tannenbaum, who apparently suffered a stroke last August while testifying in the case, acknowledged yesterday that he had beaten fellow prisoners, even out of the presence of Nazi guards, while serving as a kapo, or inmate overseer, at the Gorlitz concentration camp in what is now East Germany in 1944 and 1945.

He also acknowledged the Government's main deportation charge, that when he entered this country in 1949 he lied about his background, concealing that he had been a kapo in a camp and had participated in acts of persecution. Only three other Jews had been accused by the United States of war crimes, all in the 1950's, but none were deported.

"I think frankly that this was a fair resolution of the case," Neal M. Sher, director of the Justice Department's Office of Special Investigations, which brought the case, said after Judge I. Leo Glasser of Federal District Court signed an order stripping Mr. Tannenbaum of the citizenship he had held since 1955.

"It's the best solution for all concerned," said Mr. Tannenbaum's attorney, Elihu S. Massel. "It will also avoid a truly ghastly trial, in which Jews would have had to testify against Jews, none of whom really want to remember."

Elan Steinberg, the executive director of the World Jewish Congress, said in a statement that his organization "feels that the Justice Department handled a very sensitive matter in a most fair and equitable way, insuring that justice was applied in a firm but proper manner."

The case of Mr. Tannenbaum had provoked what many war-crimes experts and Jewish leaders called deep complexities and passions, raising such questions as why a Jew would have collaborated with the Nazis, whether the persecuted can also be the persecutor and how such questions can be answered more than 40 years after the fact.

Some Jewish leaders, while disavowing sympathy for any collaboration with the Nazis, drew distinctions between those who volunteered to help the Nazis and those who thought they were saving their own lives by cooperating, often with the intention of easing the brutal life of fellow prisoners.

Kapos - from the German word Lagerkapo, or camp captain - were appointed by the SS, which supervised the camps, and enjoyed special privileges such as better food, clothing and housing. In return, they supervised the work of other inmates.

According to members of his family, Mr. Tannenbaum, a retired dairy worker with three children who has lived in Brighton Beach for almost 40 years and has been a respected member of a synagogue, was born in Sieniawa, Poland. Conscripted into the Polish Army, he was sent to three Nazi camps during World War II.

After some time in a Polish camp in 1942, he was sent with other relatively healthy prisoners to the forced-labor camp in Galicia, where his Nazi captors blinded him in one eye and severely injured his back in a beating.

Finally, for eight months in 1944 and 1945, he served as a kapo in Gorlitz, supervising 1,000 prisoners who worked there in an armaments factory. His children have said that, far from persecuting Jews, Mr. Tannenbaum - the sole wartime survivor of a family of 12 - protected fellow prisoners from far worse treatment by Nazi officers. Admitted All Allegations

But the Government, relying on what it called eyewitness accounts of camp survivors now living in the United States and Israel, accused Mr. Tannenbaum in a detailed complaint of "brutalizing and physically abusing prisoners" and of sometimes doing so "outside the presence of German SS personnel."

Mr. Sher, of the Office of Special Investigations, said yesterday that Mr. Tannenbaum had "admitted each and every allegation in the complaint, specifically that while he was a kapo he engaged in physical abuses against prisoners even outside the presence of Germans."

A version of this article appeared in print on Friday, February 5, 1988, on section B page 1 of the New York edition.

More Articles in N.Y. / Region »

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of John Demjanjuk	)	File No. A 08 237 417
In removal proceedings	)	

CERTIFICATE OF SERVICE

I hereby certify on that April 7, 2009 I caused a copy of the foregoing EMERGENCY MOTION TO STAY REMOVAL to be served on the District Counsel of the Department of Homeland Security (ICE) by hand delivery at:

Office of Chief Counsel, DHS/ICE
1240 East 9th Street, Room 585
Cleveland, Ohio 44199

and on the Office of Special Investigations which has handled the case before the Board by hand delivery of a copy thereof to:

Eli Rosenbaum[2]
Director
Office of Special Investigations
1301 New York Avenue, Suite 200
Washington, D.C.

John Broadley

Dated April 7, 2009

[2] Counsel has been informed that Stephen Paskey who formerly acted on behalf of the Office of Special Investigations has left the Department of Justice.

ATTACHMENT C

John H. Broadley
John H. Broadley & Associates, P.C.
1054 31st Street NW, Suite 200
Washington, D.C. 20007
Tel. 202-333-6025
Fax 301-942-0676

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of John Demjanjuk	File No. A 08 237 417
In removal proceedings	

RESPONDENT'S MOTION FOR LEAVE TO FILE REPLY

Respondent, by his undersigned attorneys, hereby moves the Board for leave to file a brief reply to the Government's Opposition to his Motion to Reopen and Motion for Emergency Stay.

The government has presented two arguments which may be misleading relating to the double jeopardy issue and to Mr. Demjanjuk's medical and physical condition. The reply addresses those arguments succinctly.

Respectfully submitted,

JOHN DEMJANJUK

By: John Broadley
One of his attorneys

John Broadley
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Fax 301-942-0676
E-mail Jbroadley@alum.mit.edu

Dated: April 9, 2009

PROOF OF SERVICE

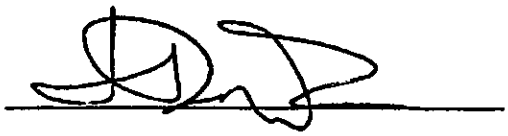
I, John Demjanjuk, Jr., hereby declare under penalty of perjury pursuant to 28 U.S.C. 1746 that on this 9th day of April 2009 I caused copies of the foregoing Respondent's Reply to Government Opposition and Respondent's Motion for Leave to File Reply to be served on:

Eli Rosenbaum
Director, Office of Special Investigations
1301 New York Avenue, NW Suite 200
Washington, D.C. 20530

AND

Office of Chief Counsel, DHS/ICE
1240 East 9th Street, Room 585
Cleveland, OH 44199

By Federal Express overnight service.

Signed April 9, 2009 

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of John Demjanjuk	File No. A 08 237 417
In removal proceedings	

RESPONDENT'S REPLY TO GOVERNMENT OPPOSITION TO MOTIONS TO REOPEN AND FOR EMERGENCY STAY

1. Double Jeopardy

The government argues (Opposition at 17-18) that the Israeli Supreme Court did not acquit Mr. Demjanjuk of complicity in crimes at Sobibor. The government conveniently ignores litigation that followed the Supreme Court's reversal of Mr. Demjanjuk's conviction.

The Israeli attorney general refused to bring charges against Mr. Demjanjuk based on Sobibor actions for several reasons, one of which is that it would have required consent of the United States under the doctrine of "specialty" in that an extradited person can only be tried for the offense for which he was extradited, another was that it might offend the rule against double jeopardy in that Sobibor was mentioned in the Israeli indictment, evidence was introduced at trial relating to Sobibor, and the attorney general himself argued on appeal that the court could find Mr. Demjanjuk guilty of offenses at Sobibor as it was covered in the indictment and adequate proof was introduced at trial.

Under Israeli procedure, a decision by the attorney general not to prosecute can be reviewed in court. Ten petitions seeking to require the attorney general to prosecute on Sobibor charges were filed and were heard by the Israeli Supreme Court sitting as a "trial" court. The Israeli Supreme Court found that attorney general's decision sound, including his concern about double jeopardy:[1]

> However, a number of other arguments put forward in favor of the decision were not unreasonable. Among these was the possibility that the 'double jeopardy' rule would be infringed. The Attorney-General's concern in this regard was supported by the fact that Demjanjuk's presence in the Sobibor camp had been mentioned in

[1] The following quotation is from a summary of the Israeli Supreme Court's decision presented by the Israeli Ministry of Foreign Affairs. http://www.mfa.gov.il/MFA/Anti-Semitism%20and%20the%20Holocaust/Documents%20and%20communiques/DECISION%20OF%20ISRAEL%20SUPREME%20COURT%20ON%20PETITION%20CONCE Site visited 4/9/09. Because of time constraints counsel has not been able to obtain an English version of the court's actual ruling.

> the indictment and in other documents submitted as evidence in the original trial and in the appeal. Moreover, the prosecution had argued in the appeal that the Court could convict Demjanjuk of offenses committed at Sobibor since these had been proved before the Court, and the defendant had had an opportunity to defend himself against these charges. Similarly, the presence of Demjanjuk at Trawniki had also been considered by the Court.

We have attached as Attachment 1 copies of the relevant pages from the Israeli indictment and also as Attachment 2 a copy of the Israeli Foreign Ministry's summary of the Supreme Court's ruling on the petitions to try Mr. Demjanjuk on Sobibor charges.

2. Mr. Demjanjuk's Medical Condition

The government quotes snippets of the medical reports submitted by respondent presumably to undermine respondent's contentions about his state of health. Interestingly, the government does not comment on the video clip submitted illustrating Mr. Demjanjuk's physical condition while being examined by the government's own doctor.

The Board will no doubt have observed the strange situation of "the dog that did not bark." The government, at great expense to the taxpayer, flew one of its own doctors to Cleveland to examine Mr. Demjanjuk. The doctor did so. And the government has not shared the doctor's report on Mr. Demjanjuk's condition either with the Board or with the respondent. While the respondent has the burden of proving his case, the striking absence of the government's own medical report on his condition undermines entirely the government's sniping at his evidence by selectively quoting snippets of the medical reports. The government's missing medical report is a dog that did not bark but should convey a loud and clear message to the Board.

Respectfully submitted,

JOHN DEMJANJUK

By: _____
One of his attorneys

John Broadley
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1054 31st Street NW, Suite 200
Washington, D.C. 20007
Tel. 202-333-6025
Fax 301-942-0676
E-mail Jbroadley@alum.mit.edu

Dated: April 9, 2009

Attachment 1

TRANSLATION

In the District Court of Jerusalem
(Special Panel)

Criminal Case 373/86

STATE OF ISRAEL

by the State Attorney's Office
Ministry of Justice
29 Salah-a-Din Street
Jerusalem

The Accuser

versus

IVAN (JOHN), son of Nicholai, DEMJANJUK
Born at Dub Macharenzi, Ukraine, Soviet Union, on April 3, 1920
Lately residing in the State of Ohio, U.S.A.
At present in custody in Israel

The Accused

INDICTMENT

The Accused is hereby charged as follows:

Statement of the Facts

A. "OPERATION REINHARDT"

1. (a) With the rise of the Nazi Party to power, the persecution of the Jews became the official policy of Germany. Between 1933 and 1945 Germany's leaders developed this policy and carried it out in stages - beginning with measures to isolate and dispossess the Jews and culminating with their annihilation in all territories subject to the rule or influence of the Third Reich.

(b) The Nazis called this plan of annihilation the "Final Solution of the Jewish Question in Europe."

2. (a) On September 21, 1939, shortly after Nazi Germany's invasion of Poland, the commanders of the SS Einsatzgruppen (mobile killing units) were

(a) A small group of SS personnel, some hundred in number, were assigned to the command of Globocnik. The members of this group were to serve as leaders of the death camps to be set up under Operation Reinhardt. Between the years 1939 and 1940 these personnel had specialized in murdering mentally ill persons in Germany in gas chambers specially constructed for this purpose. This program was known at the time as the "Euthanasia Program."

(b) In addition to these SS personnel, Soviet prisoners-of-war, who had expressed their readiness to serve the Nazis, were recruited for Operation Reinhardt (hereinafter - the "auxiliaries"). The auxiliaries were prepared for their tasks at the SS training camp at Trawniki and some of them were later assigned to serve in the death camps.

(c) The auxiliaries played an essential role in the annihilation of the Jews; without them, the commanders of Operation Reinhardt could not have carried out their plan.

(d) Serving as one of these auxiliaries was the Accused.

(b) Many of the auxiliaries were sent to serve in the Operation Reinhardt death camps where they played a central role in the annihilation of the Jews.

(c) During their training at the Trawniki Camp, at all times during their stay at the Camp after completion of their training and even following their assignment to serve outside the Camp, the auxiliaries knew that they were partners in the annihilation of the Jewish people.

C. THE DEATH CAMPS OF OPERATION REINHARDT

12. In accordance with the plan formulated at Operation Reinhardt Headquarters, three death camps were built in Eastern Poland between the months of February and July, 1942:

Belzec Camp

built in Galicia, some 40 kilometers north of Lvov, was planned to annihilate the Jews of the Krakow and Lvov districts and began operating in March 1942.

Sobibor Camp

built in Central Poland, east of Lublin, was planned to annihilate the Jews of the Lublin district and began operating in April 1942.

Treblinka Camp

built some 80 kilometers east of Warsaw, was planned to annihilate the Jews of the Warsaw and Radom districts and, later on, the Jews of the Bialystok district; it began operating in July, 1942.

G. THE REVOLT AND THE DISMANTLING OF THE CAMP

45. On August 2, 1943 the surviving remnants of the work parties revolted against their oppressors. Many of those who revolted were killed in the uprising, while others escaped to the neighboring woods. A small number of those who escaped managed to survive until after the War.

46. Shortly after the revolt, the gas chambers at Treblinka were operated for the last time. Afterwards, the SS personnel and the auxiliaries dismantled the Camp's structures, wiped out the last Jews remaining in the Camp, burned the documents relating to the Camp, ploughed over the land and set up a farm on the site.

THE ACCUSED

H. HISTORY OF THE ACCUSED PRIOR TO HIS ENLISTMENT IN THE SS AUXILIARIES

47. The Accused was born on April 3, 1920 in the village of Dub Macharenzi in the district, which is today known as Kazatin and was formerly known as Samgorodok, in the Ukraine, U.S.S.R.

48. Prior to his call-up to the army, the Accused worked in the district as a farmer and tractor operator.

49. In the winter of 1940-1941, the Accused was conscripted into the Soviet army and posted to an artillery unit.

50. In 1941, during the fighting, the Accused was injured in his back by shrapnel from a shell and during the autumn months of that year stayed

in various front-line hospitals until his recovery. This injury left a scar on his back which remains to this day.

51. Following his recovery, the Accused was posted to another artillery unit which, at the end of 1941, was sent to the front in the Crimean Peninsula.

52. At some date between his above posting and May 21, 1942, the Accused was taken prisoner by the Germans in the battles in the Kerch area of the Crimean Peninsula.

53. Following his capture, the Accused, together with other prisoners-of-war from the same battle area, was transferred to a prisoner-of-war camp at Rovno in the Western Ukraine, an area which at that time was under the control of the German army.

I. THE ACCUSED'S ENLISTMENT IN THE SS AUXILIARIES

54. At some date after the Accused's transfer to the Rovno prisoner-of-war camp and no later than July 19, 1942, the Accused was recruited to the SS auxiliaries from the prisoner-of-war camp in which he was being held and transferred to the Trawniki Training Camp.

55. On his arrival at Trawniki, the Accused was given Identity No. 1393 and went through regular induction procedures, including receipt of an identity card bearing his photograph and personal particulars. In this Camp, the Accused was trained to serve with the auxiliaries, who were to perform duties within the framework of Operation Reinhardt.

56. No later than the beginning of October 1942, the Accused was transferred to the Treblinka Death Camp, where he served with the SS auxiliaries for some eleven months, i.e., at least until September 1943.

57. During this period, at a date close to March 27, 1943, the Accused served for a short time at the Sobibor Death Camp.

58. Immediately following his arrival at Treblinka, the Accused was assigned to Camp 2, where he carried out most of the acts described below.

J. THE ACCUSED'S PART IN THE MASS MURDERS AT THE GAS CHAMBERS

59. The Accused played an essential and active role in all stages of the annihilation of the Jews in the gas chambers at Treblinka.

60. The Accused used to stand at the entrance to the gas chambers, sometimes armed with a sword or bayonet, sometimes with a whip or iron pipe. Whenever a group of naked Jews, coming from the Himmelstrasse, would arrive at the vicinity of the gas chambers, the Accused would force his victims into the chambers whilst tormenting them on their way to their death.

61. With the weapons in his possession, the Accused stabbed his victims in various parts of their bodies, tore pieces of flesh from their limbs and injured them with great force. All this was done whilst the

L. THE CIRCUMSTANCES IN WHICH THE DEEDS WERE COMMITTED

77. In his deeds described above, the Accused displayed his hatred for members of the Jewish people. The circumstances prevailing in the Camp and the powers with which the Accused was invested enabled him to express this hatred in all its intensity and to realize his intention of annihilating the Jewish people by participating in their mass murder.

78. The Accused committed the deeds attributed to him in this Indictment in 1942 and 1943. These years were part of "the period of the Nazi regime" and "the period of the Second World War," as these terms are defined in the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950.

79. The Accused committed the deeds attributed to him in this Indictment in the General Government area of Poland, a territory that was subject to the rule of Nazi Germany and, as such, was regarded as "enemy country," as this term is defined in the said Law.

80. The victims of the deeds attributed to the Accused in this Indictment were Jews who were persecuted by the Nazi regime and are therefore to be regarded as "persecuted persons," as this term is defined in the said Law.

M. THE OFFENCES COMMITTED BY THE ACCUSED

81. In his deeds described above, the Accused - together with other persons - caused the deaths of hundreds of thousands of Jews with the intention of destroying the Jewish People in whole or in part. By so doing, he committed crimes against the Jewish People.

82. In his deeds described above, the Accused - together with other persons - took part in the murder and annihilation of a civilian population. By so doing, he committed crimes against humanity.

83. In his deeds described above, the Accused - together with other persons - in a conquered territory, took part in the murder of members of the civilian populations of countries conquered by Nazi Germany. By so doing, the Accused committed war crimes.

84. In his deeds described above, the Accused, with premeditated intent, caused the death of persecuted persons as such. By so doing, the Accused committed crimes against persecuted persons; had he carried out those acts in Israel territory, the Accused would have been guilty of offences of murder under section 300 of the Penal Law, 5737-1977.

PROVISIONS OF THE ENACTMENT UNDER WHICH THE ACCUSED IS CHARGED

1. Crime against the Jewish people, an offense under section 1(a)(1), as defined in section 1(b)(1) of the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950.

2. Crime against humanity, an offense under section 1(a)(2), as defined in section 1(b) of the said Law.

3. War crime, an offense under section 1(a)(3), as defined in section 1(b) of the said Law.

4. Crimes against persecuted persons under section 2(f) of the said Law, together with section 300 of the Penal Law, 5737-1977.

NAMES OF THE PROSECUTION WITNESSES

Israel

1. Eliyahu Rosenberg
2. Pinhas Epstein
3. Sonia Lewkowitz
4. Yehiel Reichman
5. Josef Czarny
6. Yakov Shmulewitz
7. Shalom Kohn
8. Gustav Boraks
9. Y. Boraks
10. Dr. Yitzhak Arad, historian, Chairman of Yad Va-Shem
* 11. Miriam Radlwker, former investigator with the Unit for the Investigation of Nazi Crimes, Israel Police
12. Martin Kolar, former investigator with the Unit for the Investigation of Nazi Crimes, Israel Police
* 13. A. Kozlowski, former investigator with the Unit for the Investigation of Nazi Crimes, Israel Police
* 14. Wolf Paluszewski, former investigator with the Unit for the Investigation of Nazi Crimes, Israel Police
* 15. Michael Goldman, former investigator with the 06 Bureau, Israel Police

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* These witnesses will submit, inter alia, the statements of the late Abraham Goldfarb, Eugen Turowski, Abraham Lindwasser, and Georg Rajgrodski, and reports from photo identifications conducted with them.

6. Assistant Commander Alex Ish-Shalom, National Unit for Criminal Investigation, Israel Police
7. Sergeant-Major Zvi Shalom Tamari, National Unit for Criminal Investigation, Israel Police
8. Inspector Izia Sobelman, National Unit for Criminal Investigation, Israel Police
9. Chief Superintendent Zvi Ariel, National Unit for Criminal Investigation, Israel Police
10. Superintendent A. Kaplan, National Unit for Criminal Investigation, Israel Police
11. Dr. Shmuel Krakowski, Chief Archivist of Yad Va-Shem
12. Bronka Klibanski, Yad Va-Shem
13. Rehavam Amir, former Minister of the Israel Legation in Poland
14. Prof. Abraham Alsberg, State Archivist (who will submit documents and testimonies from Criminal Case 40/61, the State of Israel v. A. Eichmann, of the District Court in Jerusalem)
15. Expert on military history

Poland

16. Franciszek Zabecki
17. Jozef Kuzminski
18. Z. Lukaszkiewicz, Judge-Investigator under the auspices of the Main Commission for the Investigation of Nazi Crimes in Poland

Germany

19. Prof. Wolfgang Scheffler, historian
20. Helge Grabitz, Senior Prosecutor in Hamburg
21. Daniel Simon, Director of the Berlin Document Center
22. Norbert Blazy, Senior Prosecutor in Duesseldorf
23. Paul Ellenbogen, Court Reporter and Notary Public
24. H. Chanteaux, Senior Prosecutor in Duesseldorf
25. F. Doms, Legal Clerk in the Zentralle Stelle der Landesjustizverwaltung zur Aufklaerung nationalsozialistischer Verbrechen, Ludwigsburg
26. Otto Horn
27. Willy Maetzig
28. Heinrich Scheefer
29. Helmut Leonhardt

Belgium

30. Vladas Amanaviczius

United States of America

41. Gideon Epstein, Forensic Document Expert
42. Daniel Segal, former Chief Eligibility Officer for the International Refugee Organization (IRO)
43. Leo Curry, former Case Analyst for the Displaced Persons Commission (DPC)
44. Harold Lee Henrikson, former United States Vice Consul in Germany
45. Richard Pritchard, former Assistant Director of the Immigration and Naturalization Service (INS), Cleveland
46. Linda S. Kulhanek, Court Reporter and Notary Public
47. Joseph S. Corsillo, Court Reporter and Notary Public
48. Lyle Karn, District Director of INS, Philadelphia
49. Jack F. Wohl, Courtroom Deputy Clerk in United States District Court, Cleveland
50. Russell E. Ezolt, District Counsel, INS, Cleveland
51. Robert Wolfe, Chief of Military Reference Branch, Military Archives Division, U.S. National Archives, Washington, D.C.
52. Lee Koury, U.S. Marshal
53. Richard Edwin Schroeder, U.S. Marshal

All the above witnesses will be summoned by the prosecution.

Jerusalem,
29 September, 1986
25 Elul, 5746

Yosef Harish
Attorney General

Attachment 2

DECISION OF ISRAEL SUPREME COURT ON PETITION CONCERNING JOHN -IVAN- DEMJANUK - 18-Aug-93

18 Aug 1993

DECISION OF ISRAEL SUPREME COURT ON PETITION CONCERNING JOHN (IVAN) DEMJANUK ON AUGUST 18, 1993

UNOFFICIAL SUMMARY OF DECISION

On August 18, 1993 the Supreme Court of Israel sitting as the High Court of Justice gave its decision on 10 petitions brought by survivors of the Holocaust and others demanding that John (Ivan) Demjanjuk should be brought to trial on charges of war-crimes at Sobibor and other concentration camps. These petitions follow the decision of the Supreme Court to acquit Demjanjuk, by reason of doubt, of the brutal offenses attributed to Ivan the Terrible of Treblinka.

The court of three judges dismissed the petitions.

JUSTICE SHLOMO LEVIN considered in detail the reasons set out in the opinion of the Attorney-General which argued against bringing Demjanjuk to trial. This opinion was based on four arguments:

1) That a further trial would infringe the rule of 'double jeopardy' in that Demjanjuk would be standing trial for offenses in respect of which he had already been tried and acquitted.

2) That the Supreme Court, in acquitting Demjanjuk of charges attributed to Ivan the Terrible of Treblinka, had stated that it did not think it reasonable to commence new proceedings against him, in view of the seriousness of the offenses with which he had originally been charged and the nature and circumstances of the alternative charges.

3) That on the basis of the evidence available, it was unlikely that Demjanjuk would be convicted of the alternative charges, and that risking a further acquittal was not in the public interest.

4) That Demjanjuk was extradited form the United Staes specifically to stand trial for offenses attributed to Ivan the Terrible of Treblinka, and not for other alternative charges.

Justice Levin noted that under Israeli law, it was established that authority in criminal matters is vested with the Attorney-General, who is authorized to bring charges in any case where there is sufficient evidence, unless he believes that there is no public interst in bringing the case. He further noted that the Attorney-General has a wide discretion in making such a decision and that the Court should only intervene when the decision is so untenable as to be totally unreasonable.

Justice Levin went on to consider the arguments put forward by the Attorney-General. He found that it was not unreasonable to consider that bringing charges against Demjanjuk might infringe the 'double jeopardy' rule. Similarly, it was not unreasonable to estimate that chances of convicting Demnajuk were small, particularly in view of the fact that none of the survivors of the Sobibor camp had identified him. Justice Levin also held that, although the opinion of the Supreme Court as regards further proceedings only related to the case before it, the Attorney-General could not be criticized for giving weight to the Court's comments in this regard.

Justice Levin considred a number of other arguments raised by the petitioners, among them that a failure to bring Domjanjuk to trial would effectvely broadcast a message that the time when Nazi war criminals could be brought to trial has passed. This, he said, was not so. The obligation to bring Nazis and collaborators to trial remains

binding on every state, when there is evidence to substantiate the charges.

JUSTICE GAVRIEL BACH noted the difficulties involved in releasing a defendant who may be guilty of the barbaric and bestial offenses committed by the Nazis.

Justice Bach stated that he differed from his colleagues in that he did not attach any significant weight to some of the arguments put forward by the Attorney-General. Among these was the argument that the decision of the Supreme Court acquitting Demjanjuk of the crimes attributed to Ivan the Terrible contained a direction, express or implied, not to institute further proceedings against him. The relevant portion of the court's decision, stated Justice Bach, related only to the specific question whether the case should be referred back to the District Court. A case should be referred back to a lower court when new evidence which may cast light on the charge in question is presented to the court. This was not the s ituatioBn Abefore the Supreme Court; the question was whether the defendant should be convicted of offenses at Sobibor and Trawniki, charges substantially different from those in the indictment before the Court. For this reason, stated Justice Bach, the court was unable to refer the case back to the lower court. It was not the Court's intention , however, to instruct the prosecutorial system on the issue of whether to bring additional charges.

As regards the argument that Demjanjuk had been extradited specifically to stand trial for offenses attributed to Ivan the Terrible of Treblinka, Justice Bach found that this also was not persuasive. Even if the consent of the United States authorities was required in order to bring further charges, such consent could be requested. If the request was refused, no charges need be filed and the defendant could be deported.

Accordingly, if the decision of the Attorney-General had been based on these considerations alone, Justice Bach stated that there would have been grounds to intervene in the decision.

However, a number of other arguments put forward in favor of the decision were not unreasonable. Among these was the possibility that the 'double jeopardy' rule would be infringed. The Attorney-General's concern in this regard was supported by the fact that Demjanjuk's presence in the Sobibor camp had been mentioned in the indictment and in other documents submitted as evidence in the original trial and in the appeal. Moreover, the prosecution had argued in the appeal that the Court could convict Demjanjuk of offenses committed at Sobibor since these had been proved before the Court, and the defendant had had an opportunity to defend himself against these charges. Similarly, the presence of Demjanjuk at Trawniki had also been considered by the Court.

Justice Bach also considered the arguemnt that bringing further charges would not serve the public interest, since evidentiary difficulties raised the likelihood of a further acquittal. He did not feel that this consideration was unreasonable.

Accordingly, Justice Bach concurred in dismissing the petitions. He emphasized, however, that this should in no way be taken to imply that war criminals can no longer be brought to trial. The Israeli legislator placed no statute of limitations on offenses committed by Nazis and their collaborators, and in many cases no evidentiary difficulties in proving the identity and activities of the defendant arise. Nazis and collaborators should continue to be found and brought to trial, as long as they live.

JUSTICE MISHAEL CHESHIN noted the grave responsibility that rests on the Court when deciding whether to intervene in an administrative decision. He also noted the inadequacy of the legal system, which is designed to deal with behavioral norms, when confronted with the scale of the atrocities committed by the Nazis.

Justice Cheshin then considered the decision of the Supreme Court not to convict Demjanjuk of the charges other than those relating to offenses committed at Treblinka. In this decision he saw more than a hint to conclude the proceedings against Demjanjuk. He concerred with Justice Levin in finding that the Attorney-General was entitled to take guidance from the comments of the court, even though strictly they related only to the proceedings actually before the Court.

Justice Chesin stated that he saw no room to intervene in the decision of the Attorney-General, and that he concurred with the view and reasoning of Justice Levin.

SEE ALSO ...

- THE DEMJANJUK CASE: FACTUAL AND LEGAL DETAILS - 28-Jul-93
- THE DEMJANJUK APPEAL: SUMMARY BY ASHER FELIX

LANDAU - 29-Jul-93

ATTACHMENT D

(Video No. 2--Demjanjuk Removal April 14, 2009)

WKYC TV

DEMJANJUK

REMOVAL

(VIDEO 2
APRIL 14, 2009)